No. 91-874

In the
Supreme Court of the United States

OCTOBER TERM, 1991

BELLEVILLE INDUSTRIES, INC.,
PETITIONER,

v.

LUMBERMENS MUTUAL CASUALTY CO.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an essential question of state law was certified to the Supreme Judicial Court of Massachusetts by the District Court, was the Circuit Court in error when it rejected the substantive law established in this case in response to that certified question?

2. Whether the Circuit Court violated Fed. R. Civ. P. 52(a) when it disregarded specific findings of the District Court made after trial and substituted therefor actual assumptions which resulted in a holding antithetical to governing law of Massachusetts in contravention of *Erie* v. *Tompkins*.

3. Whether the Circuit Court refused to follow *Erie* v. *Tompkins* when, after ignoring the provisions of 42 U.S.C. § 9067(j) and violating the provisions of Fed. R. Civ. P. 52(a) by rejecting specific factual findings made by the District Court after trial as to the basis of Belleville's liability, the Circuit Court substituted a standard which was contrary to well settled law of Massachusetts.

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The petitioner, defendant-appellee in the proceedings below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on July 16, 1991.

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[1] The parties to the proceeding in the United States Court of Appeals for the First Circuit were Belleville Industries, Inc.; Lumbermens Mutual Casualty Company; and Insurance Environmental Litigation Association and United Technologies Corporation, Amici Curiae. Pursuant to Rule 29.1, Belleville Industries, Inc. states that it has no parent corporation and no subsidiary corporations.

OPINIONS BELOW

The July 16, 1991, opinion of the United States Court of Appeals for the First Circuit is reported at 938 F.2d 1423 and is reproduced in Appendix A herein. The Findings and Rulings of Law of the United States District Court for the District of Massachusetts dated January 4, 1991, appear in Appendix B herein; they are unreported. The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 555 N.E.2d 568 and 407 Mass. 675 and is reproduced in Appendix B herein.

JURISDICTION

The Court of Appeals judgment, affirming in part and reversing in part the judgment of the District Court, was entered on July 16, 1991. Appendix A. On August 28, 1991, the Court of Appeals denied the timely petition for rehearing and suggestion for rehearing *en banc*. Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The pertinent provisions of the federal statutes (28 U.S.C. § 1652; and 42 U.S.C. §§ 9607(j) and 9601(10) [CERCLA]) and federal rules (Fed. R. Civ. P. 52(a)) are set forth in Appendix D herein.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Late in 1983, the United States and the Commonwealth of Massachusetts brought an action against Belleville Industries,

Inc. ("Belleville"), seeking recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other federal and state law due to the release of polychlorinated biphenyls (PCBs) into the Acushnet River (App. A. p. 3a). In its Answer, Belleville asserted the permit defense authorized by 42 U.S.C. § 9607(j). The government plaintiffs ultimately obtained partial summary judgment as to Belleville's CERCLA liability to them in this action (App. A. p. 4a).

In 1984, Lumbermens Mutual Casualty Company ("Lumbermens") brought this action under 28 U.S.C. §§ 2201 and 2202 to obtain a declaration of rights and obligations under contracts of comprehensive general liability insurance issued by Lumbermens to Belleville (App. B. p. 3a). This action was consolidated with the cases brought by the governments against Belleville.

At issue in the insurance action was Lumbermens' basic undertaking to pay "all sums which the insured shall become legally obligated to pay" as property damages because of "an accident, . . . which results in . . . property damage neither expected nor intended . . . ." (App. A. p. 4a). Lumbermens asserted an exclusion of coverage for "property damage arising out of the . . . release . . . of . . . pollutants into or upon land, the atmosphere or any water course or body of water," which further provides "[b]ut this exclusion does not apply if such . . . release . . . is sudden and accidental." (App. A. p. 4a.)

The District Court certified to the Massachusetts Supreme Judicial Court the question regarding the proper application of this "sudden and accidental clause" in this case (App. A. p. 4a). *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264 (D. Mass. 1989). The Supreme Judicial Court issued its response to this certified question on June 14, 1990 (App. B. pp. 43a-56a).

After the District Court entered partial summary judgment as to Belleville's liability to the government plaintiffs in the CERCLA case, Belleville, with the consent of Lumbermens, settled the underlying action with the sovereigns, subject to the Court's approval of the appropriate consent decree, for the payment of $4,000,000 (App. B. pp. 17a-18a).

This insurance action was thereafter tried jury waived over nine days from November 13, 1990, to November 29, 1990 (App. B. p. 18a). The Trial Court issued its Findings and Rulings of Law on January 4, 1991, and Judgment entered on that date (App. B. pp. 17a-42a).

The Trial Court found the following facts:

Prior to January 2, 1973, when Belleville commenced operation of the electrical capacitor manufacturing plant, an application had been made for a permit to discharge effluent into the adjacent Acushnet River in accordance with 33 U.S.C. § 407, the Refuse Act (App. B. p. 21a). Belleville's operations were conducted under that permit application until a formal permit was issued to Belleville (App. B. pp. 21a). At all times until it ceased doing business, Belleville operated under either the permit application or the formal permit (App. B. p. 21a).

Belleville's liability to the government plaintiffs was premised on its use of a PCB product known as Aroclor (App. B. p. 41a). Ninety-nine percent of Belleville's operation involved the use of Aroclor 1016 (App. B. p. 41a). All but four-tenths of one percent of that product, Aroclor 1016, was biodegradable (App. B. p. 41a).

Belleville at all times considered that it ran an environmentally safe, progressive, and largely incident-free operation (App. B. p. 26a).

Belleville neither expected nor intended any property damage or personal injury from its use of PCBs, and had no knowledge that any such property damage or personal injury was occurring (App. B. p. 39a).

During an intense tropical storm in 1973, the water table rose from under the plant, flooding the interior to a height where the entire floor in certain areas was inundated (App. B. p. 30a). PCBs, which were washed from the floors and the lower interior walls of the facility by the flooding, flowed out under and around the door at the eastern (river) end of the facility (App. B. p. 31a).

The District Court expressly found that this release was "sudden and accidental" and was unexpected and unintended by Belleville:

> This escape of PCBs was sudden. After all, the release was by operation of flood waters themselves rather than through any natural underground waterflow or natural erosion of sediments within the harbor. What's more, it was accidental in the sense that the release was both unexpected and occurred without the assistance of any human agency.

(App. B. p. 32a.) The District Court concluded that this was a sudden and accidental release for which Belleville was entitled to indemnification from Lumbermens (App. B. pp. 32a-33a).

The Court further found, as a matter of fact on the evidence adduced at trial, that:

> Belleville has thus established that . . . the property damage liability which it settled for the payment of $4 million in the underlying action brought by the sovereigns was neither expected nor intended from its standpoint.

(App. B. p. 40a.)

However, reasoning that only .4 percent of the pollutants washed out by the storm remained by the time at which liability

under CERCLA adhered, the District Court multiplied the total damages paid by Belleville by .004 and awarded Belleville an indemnification from Lumbermens of $16,000.00 (App. A. p. 9a).

Belleville timely appealed and Lumbermens filed a cross appeal (App. A. p. 2a).

II. The Court of Appeals Decision

The United States Court of Appeals for the First Circuit, while recognizing the improper nature of the calculation used to reduce Belleville's indemnification rights, nevertheless reversed the District Court's judgment that Lumbermens had an indemnity liability under the insurance policy issued to Belleville (App. A. p. 16a).

In so ruling, the Circuit Court stated that the "sudden and accidental" exception to the exclusion of coverage did not apply, reasoning, in contrast to the District Court findings, that the discharges were caused by events which could have been within the long-range expectation of the insured (App. A. p. 9a).

The Circuit Court also dismissed the District Court finding regarding Belleville's liability to the CERCLA plaintiffs and stated that the specific basis of that liability would not affect its application of the "sudden and accidental" clause in light of Belleville's ordinary business operations. The Circuit Court refused to attach any significance to the federally permitted release exception to CERCLA liability provided by 42 U.S.C. § 9607(j).

Belleville subsequently filed its Petition for Rehearing and Suggestion for Rehearing *En Banc*, raising the arguments made herein. That petition and suggestion were denied on August 28, 1991 (App. C. pp. 57a-58a). The present Petition for Certiorari followed.

ARGUMENT

In violation of the rule of *Erie* v. *Tompkins*, the Circuit Court decision repudiated the substantive law established by the Supreme Judicial Court of Massachusetts in response to questions certified by the District Court in this very case. The Circuit Court holding also refused to acknowledge the impact of the provisions of 42 U.S.C. § 9607(j), and rejected the specific factual findings made by the District Court after trial and relied on unwarranted assumptions in violation of Fed. R. Civ. P. 52(a). This action and the consolidated CERCLA action are landmark cases,[2] and the errors in the Circuit Court opinion and holding must not be allowed to remain as precedent.

By rejecting the specific factual findings of the Trial Court and relying on unwarranted factual assumptions, the Circuit Court's opinion violated Fed. R. Civ. P. 52(a). The violations

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[2] *In re Acushnet River & New Bedford Harbor*, 675 F.Supp. 22 (D. Mass. 1987) ("Acushnet I") (jurisdiction and parties); 712 F.Supp. 994 (D. Mass. 1989) ("Acushnet II") (the right to jury trial); 712 F.Supp. 1010 (D. Mass. 1989) ("Acushnet III") (successor liability); 712 F.Supp. 1019 (D. Mass. 1989) ("Acushnet IV") (partial settlements); 716 F.Supp. 676 (D. Mass. 1989) ("Acushnet V") (natural resource damages under CERCLA); 722 F.Supp. 888 (D. Mass. 1989) ("Acushnet VI") (scope and standard of judicial review); 722 F.Supp. 893 (D. Mass. 1989) ("Acushnet VII") (federally permitted releases); and 725 F.Supp. 1264 (D. Mass. 1989) ("Acushnet VIII") (certification of insurance issues).

Lumbermens Mutual Casualty Co. v. *Belleville Industries, Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990).

See *Covenant Ins. Co.* v. *Friday Engineering, Inc.*, 742 F.Supp. 708, 709 (D. Mass. 1990); *CPC International, Inc.* v. *Northbrook Excess & Surplus Insurance Co.*, 759 F.Supp. 966 (D. R.I. 1991); *A. Johnson & Co., Inc.* v. *Aetna Casualty & Surety Company*, 933 F.2d 66, 72 (1st Cir. 1991); *New Castle County* v. *Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1195 (3d Cir. 1991).

See also *Hazen Paper Co.* v. *United States Fidelity & Guaranty Co.*, 407 Mass. 689, 555 N.E.2d 576 (1990), which was argued with and decided the same day as *Lumbermens* v. *Belleville, supra*.

of Fed. R. Civ. P. 52(a) were serious and, combined with that Circuit Court's refusal to apply the CERCLA permit defense, provided a method whereby the Circuit Court could, in violation of the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and 28 U.S.C. § 1652, reject the settled law of Massachusetts, which law governs this controversy. That law was expressed by the Supreme Judicial Court of Massachusetts in the decision accompanying its response to the questions certified in this very case.

The violation of *Erie* was threefold. First, and most important to the constitutional principles involved, the Circuit Court decided this case on a basis which was expressly rejected by the Supreme Judicial Court of Massachusetts when it responded to questions certified to it by the District Court in this very case.

Second, the Circuit Court did not follow the Massachusetts substantive rule of law that it is a particular insured's specific expectations and intent that determine insurance coverage.

Third, the Circuit Court rejected the substantive rule of Massachusetts law that it is the actual basis of the insured's liability to a claimant, such as the government plaintiffs in the consolidated CERCLA case, that governs the decision in an insurance action and substituted an erroneous concept based on Belleville's permitted business operations. Central to the Circuit Court's conclusion, that coverage would be denied to Belleville due to the nature of its ordinary business operations, was that Court's failure to acknowledge, as the District Court appreciated, that the provisions of 42 U.S.C. § 9607(j) (the CERCLA permit defense) precluded discharges from those operations from being a basis of Belleville's liability to pay the government plaintiffs $4,000,000.00. This aspect of the Circuit Court opinion has far ranging implications, beyond insurance actions, since it appears to reject the viability of the permit defense in CERCLA actions.

These deviations from the rule of *Erie* v. *Tompkins* have widespread ramifications since it is the present action of *Lumbermens* v. *Belleville* which is establishing precedent for all actions involving the application of insurance law in CERCLA matters.[3]

Failure to correct these errors will, at a minimum, put forum shopping at a premium and will doubtless waste substantial resources of the Courts and litigants until these matters are properly resolved. Chaos exists since no insured, situated similarly to Belleville, can be expected to rely on the subject Circuit Court opinion which is so manifestly in error.

I. The Circuit Court Totally Rejected The Controlling Rule Established In This Very Case By The Supreme Judicial Court Of Massachusetts And, Thus, Violated The Directive Of *Erie* v. *Tompkins* When It Ruled That The Specific Basis Of Belleville's Liability To The Governmental Plaintiffs Would Not Affect Its Application Of The Insurance Contract And Substituted Its Own Rule Of Decision Founded On An Assumed Basis Of Liability[4] (App. A. p. 15a).

The Supreme Judicial Court of Massachusetts expressly rejected the analysis adopted by the Circuit Court, which held that Belleville could not be indemnified due to the nature of its ordinary business operations. *Lumbermens Mutual Casualty Co.* v. *Belleville Industries, Inc.*, 938 F.2d 1423, 1430 (1st Cir.

[3] See *Covenant Ins. Co.* v. *Friday Engineering, Inc.*, 742 F.Supp. 708, 709 (D. Mass. 1990); *CPC International, Inc.* v. *Northbrook Excess & Surplus Insurance Co.*, 759 F.Supp. 966 (D. R.I. 1991); *A. Johnson & Co., Inc.* v. *Aetna Casualty & Surety Company*, 933 F.2d 66, 72 (1st Cir. 1991); *New Castle County* v. *Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1195 (3d Cir. 1991).

[4] As will be discussed in Section III, *infra*, the facts referenced by the Circuit Court to support its decision have no relevance to either the CERCLA action or this action because of 42 U.S.C. § 9607(j), the CERCLA permit defense.

1991) (App. A. p. 15a). In response to certified questions in this very case, the Massachusetts Court held that application of the pollution exclusion clause [the sudden and accidental clause] is *not* to be determined by reference to the cause of the release. *Lumbermens Mutual Casualty Co.* v. *Belleville Industries, Inc.*, 407 Mass. 675, 679, 555 N.E.2d 568, 571 (1990) (App. B. pp. 43a, 47a).

The normal business operations of Belleville were explicated, in detail, by the District Court in its Memorandum and Order accompanying the questions certified by it to the Supreme Judicial Court of Massachusetts. *In re Acushnet River & New Bedford Harbor*, 725 F.Supp. 1264 (1989). The Supreme Judicial Court of Massachusetts referenced those operations in its response to the questions certified (App. B. pp. 44a-45a), and held that they were not the operative facts to be utilized in determining coverage under the sudden and accidental clause.

The holding of the Supreme Judicial Court was precisely that the sudden and accidental clause would provide coverage to Belleville, a manufacturer whose processes involved the use of a hazardous substance,[5] if the requisite factual findings were made by the District Court.[6] Thus, under Massachusetts law, the normal business operations standard adopted by the Circuit Court is not the focal point.

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[5] See also the decision of the Massachusetts Supreme Judicial Court in the case of *Hazen Paper Co.* v. *United States Fidelity & Guaranty Co.*, 407 Mass. 689, 555 N.E.2d 576 (1990), which was argued with and decided the same day as *Lumbermens* v. *Belleville*, wherein the Supreme Judicial Court did not preclude coverage under the "sudden and accidental" clause for a facility whose normal business operations consisted of a "hazardous waste facility." 407 Mass. at 690, 692, 555 N.E.2d at 578-579. Thus, although the panel of the Circuit Court might consider that only "health food" establishments have coverage (App. A. p. 15a), the full Supreme Judicial Court of Massachusetts ruled that coverage might even apply to a waste facility.

[6] The careful analysis conducted by the District Court judge, as required by Massachusetts law, was spurned as "a microanalytic approach" (App. A. p. 10a) by the Circuit Court.

> *The sudden event to which the exception in the pollution exclusion clause applies concerns neither the cause of the release* of a pollutant nor the damage caused by the release. It is the release of pollutants itself that must have occurred suddenly, if the exception is to apply so as to provide coverage.

(App. B. p. 47a) (emphasis supplied). The sudden and accidental exception thus focuses on the circumstances of the release: the "abruptness of the commencement of the release or discharge of the pollutant is the crucial element." (App. B. p. 49a.)

It is obvious that the discharge or release has relevance under Massachusetts law; the operations of the insured, relied on by the Circuit Court, normal or otherwise, are inconsequential.

There can be no dispute that the response by the Supreme Judicial Court of Massachusetts to the questions certified by the District Court was entitled to the binding application of *Erie* v. *Tompkins*. 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 4248, at 179. The First Circuit Court recognized that principle in *Tarr* v. *Manchester Insurance Corporation*, 544 F.2d 14, 15 (1st Cir. 1976):

> The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else. The rule of *Erie RR.* v. *Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, calls on us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it.

Despite its well reasoned statement in *Tarr*, no other analysis of the Circuit Court's holding in the instant case is possible than that the Court not only afforded a party the opportunity to persuade the Court to say that the law was other than what the state court said it was, but, more importantly, the Court has participated in an attempt to change settled law.

The comment contained in *American Home Prods. Corp.* v. *Liberty Mutual Ins. Co.*, 565 F.Supp. 1485, 1512 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), is at least as valid now as when it was written.

> The disparities of construction among the federal courts is a matter of national concern, because *many of the courts involved are not even attempting to apply state law in reaching their results*, and because these rulings are having significant effects upon the victims of insidious diseases, upon manufacturers, and upon the insurance industry, throughout the nation.

(Emphasis supplied.)

As understandable as it is that the Circuit Court would like to frame rules of interpretation which can be universally applied to all insurance coverage disputes no matter which state's laws should control, the price of that uniformity is to render the rule of *Erie* v. *Tompkins* nugatory.

II. The Circuit Court Opinion Was Violative Of Fed. R. Civ. P. 52(a) In Its Rejection Of The Trial Court's Findings Of Belleville's Expectations And Intent Which Led The Circuit Court To Contravene, In Violation Of The Rule Of *Erie* v. *Tompkins*, The Settled Massachusetts Law That An Actual Insured's Expectations And Intent Govern An Insurance Controversy, Not Those Of Some Hypothetical Insured.

Among the subsidiary facts found by the Trial Court to support its findings and conclusion that Belleville, with respect to the matters central to the insurance controversy, neither expected nor intended releases, property damage, or liability to result from its operations, were the following:

1. "Belleville at all times considered that it ran an environmentally safe, progressive and largely incident free operation." (App. B. p. 26a.)

2. "This escape of PCBs was sudden. . . . What's more, it was accidental in the sense that the release was both unexpected and occurred without the assistance of any human agency." (App. B. p. 32a.)

3. "The simple fact is that while Belleville management knew for years that PCBs could well be the cause of adverse regulatory actions, Belleville neither expected nor intended any property damage or personal injury from its use of PCBs and had no knowledge that any such property damage or personal injury was occurring." (App. B. p. 39a.)

4. "But at no time prior to the commencement of the instant litigation could it reasonably have believed that it was causing property damage to an insurable interest." (App. B. p. 40a.)

5. Belleville's liability to the government plaintiffs was premised on its use of a PCB product known as Aroclor (App. B. p. 41a). Ninety-nine percent of Belleville's operation involved the use of Aroclor 1016 (App. B. p. 41a). All but four-

tenths of one percent of that product, Aroclor 1016, was biodegradable (App. B. p. 41a).

6. "Belleville has thus established that . . . the property damage liability which it settled for the payment of $4 million in the underlying action brought by the sovereigns was neither expected nor intended from its standpoint." (App. B. p. 40a.)

It must be noted that these findings were made by a judge who had many years experience as a justice of the Superior Court of Massachusetts, had been responsible for the consolidated actions for more than five years, had issued numerous opinions in these cases,[7] had received guidance in his decision by the response of the Supreme Judicial Court of Massachusetts to questions certified to it by the District Court in this very case,[8] and, most importantly, had conducted a nine-day trial at which lay witnesses and the principal officers and other employees of Belleville, including witnesses called by Lumbermens, had testified.

Despite those specific factual findings of the District Court, the Circuit Court rejected them and factually opined to the contrary:

1. The discharges were caused by events not clearly beyond the long-range, reasonable expectation of the insured (App. A. p. 9a).

2. The operations of Belleville involved a likelihood of continuing polluting releases (App. A. p. 9a).

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[7] *In re Acushnet River & New Bedford Harbor*, 675 F.Supp. 22 (D. Mass. 1987) ("Acushnet I") (jurisdiction and parties); 712 F.Supp. 994 (D. Mass. 1989) ("Acushnet II") (the right to jury trial); 712 F.Supp. 1010 (D. Mass. 1989) ("Acushnet III") (successor liability); 712 F.Supp. 1019 (D. Mass. 1989) ("Acushnet IV") (partial settlements); 716 F.Supp. 676 (D. Mass. 1989) ("Acushnet V") (natural resource damages under CERCLA); 722 F.Supp. 888 (D. Mass. 1989) ("Acushnet VI") (scope and standard of judicial review); 722 F.Supp. 893 (D. Mass. 1989) ("Acushnet VII") (federally permitted releases); and 725 F.Supp. 1264 (D. Mass. 1989) ("Acushnet VIII") (certificate of insurance issues).

[8] *Lumbermens Mutual Casualty Co.* v. *Belleville Industries, Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990) (App. B. pp. 43a-56a).

The Circuit Court did not comply with the requirements of Fed. R. Civ. P. 52(a). The directive of Fed. R. Civ.P. 52(a) is clear: "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. , 110 L.Ed. 2d 359, 378, 110 S.Ct. (1990).[9] Despite language in its opinion acknowledging this mandate (App. A. p. 9a), the Circuit Court clearly rejected the District Court's findings with respect to Belleville's expectations and intent.

This rejection of the Trial Court's findings that the insured, Belleville, neither expected nor intended that either the damage or the subject releases would result from its operations, allowed the Circuit Court to support its holding by reference to decisions [10] which were not grounded upon similar findings reached after trial on the merits.

Further, the failure of the Circuit Court to abide by the provisions of Fed. R. Civ. P. 52(a) allowed that Court, *sub silentio*, to violate the rule of *Erie* v. *Tompkins* and establish a rule of insurance law directly contrary to the controlling law of the Commonwealth of Massachusetts. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); 28 U.S.C. § 1652.

The law of Massachusetts is totally settled with respect to the point that it is the actual expectations and the actual intent of a particular insured, such as Belleville, not those of a hypothetical insured, which govern the issue of whether insurance proceeds are payable. In *Quincy Mutual Fire Ins. Co.* v.

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[9] Lumbermens never raised on appeal to the Circuit Court the contention that the District Court findings of fact were erroneous or unsupported by evidence.

[10] Among the cases relied on by the Circuit Court was its own opinion, *Great Lakes Container Corp.* v. *National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984), a case involving New Hampshire law wherein not only was there no trial on the merits, but also wherein the insured failed to respond to Summary Judgment motions and was denied leave to respond late by the District Court.

Abernathy, 393 Mass. 81, 469 N.E.2d 797 (1984), it was made clear beyond peradventure that a trial court applying substantive Massachusetts law is required to make inquiry into the specific insured's actual expectations and intent and that, under Massachusetts law, some "reasonable insured standard" could not be substituted therefor.

As properly noted by the Trial Court in its discussion accompanying the certification of questions, in this very case, to the Supreme Judicial Court of Massachusetts:

> Similarly, Massachusetts courts have held that an unintentional result of an intentional act is still an accident: the resulting injury which ensues from the volitional act of an insured is still an "accident" within the meaning of an insurance policy *if the insured does not specifically intend* to cause the resulting harm *or is not substantially certain* that such harm will occur. *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264, 1273 (D. Mass. 1989), citing *Quincy Mutual Fire Ins. Co.* v. *Abernathy*, 393 Mass. at 84, 469 N.E.2d 797.

(Emphasis supplied.)

For the Circuit Court to base its holding on surmised long-range, reasonable expectations of some hypothetical insured not only is contrary to the specific findings of the trial judge, but also does not comport with the established requirement of Massachusetts law that such a conclusion must be based on the factual determination of a particular insured's actual expectations and intent.

It does not require extensive discussion to recognize that if such a position is allowed to remain uncorrected, it will promote forum shopping and defeat the reasonable expectations of insureds when the diversity rules cause their cases to be tried in Federal Court.

III. The Circuit Court's Express Disregard Of The District Court's Findings As To The Specific Basis Of Belleville's Liability To The Government Plaintiffs In The Consolidated CERCLA Case Was A Repudiation Of The Rule Of *Erie* v. *Tompkins*, Which Repudiation Was Grounded Upon A Violation Of Fed. R. Civ. P. 52(a) And A Misapprehension Of 42 U.S.C. § 9607(j).

The Trial Court correctly found the facts regarding the basis of Belleville's liability which were relevant under the law of Massachusetts, and Lumbermens did not appeal from that finding of fact. The Circuit Court substituted therefor unfounded broad language relating to Belleville's normal business operations which rejects, without reference, the unquestionable substantive principles of Massachusetts law. The Circuit Court holding, that the specific basis of Belleville's CERCLA liability to the governmental plaintiffs is irrelevant, totally disregards the rule of law of the Commonwealth of Massachusetts, despite the directives of *Erie* v. *Tompkins*.

The governing substantive rule of state law is that the specific basis of a defendant's liability to a claimant determines whether there is a duty to indemnify. That rule applies to all types of indemnity, not just insurance controversies. *Pasquale* v. *Shore*, 343 Mass. 239, 178 N.E.2d 281 (1961); see also the Uniform Commercial Code, Massachusetts General Laws, Chapter 106, § 2-607(5)(a). In insurance controversies, the specific basis of the insured's liability to a claimant is the only correct basis for determining whether an insurance policy applies. *Jertson* v. *Hartley and Lumbermens Mutual Casualty Co.*, 342 Mass. 597, 174 N.E.2d 663 (1961); *Miller* v. *U.S. Fidelity & Cas. Co.*, 291 Mass. 445, 197 N.E. 75 (1935). *Sterilite* v. *Continental Casualty Co.*, 17 Mass. App. Ct. 316, 323-324, 4 58 N.E.2d 338, 343-344 (1983), clearly establishes that facts which do not specifically form a basis of the insured's liability

to a claimant are not a proper basis for determining an insurer's duties. The Supreme Judicial Court of Massachusetts, in ruling on certified issues *in this very case*, recognized that principle in upholding the validity of the *Sterilite* rulings (App. B. pp. 51a-54a).

The District Court, applying the settled requirement of Massachusetts law that insurance coverage questions must be determined by reference to the basis of an insured's liability to the original claimants, made such a factual determination. As amplified in Belleville's Petition for Rehearing and Suggestion for Rehearing *En Banc* at page 7, the trial judge properly recognized that the insurance coverage determination had to be based on Belleville's liability in the consolidated CERCLA case:

> Not liability now, because liability, of course, is going to be decided by the jury and the judge in the morning case and the insurers are just going to be stuck with it, maybe they'll succeed, maybe they won't, we'll see, but either way *the resolution of the underlying case is the resolution of the liability aspects of the case*.

(Emphasis supplied.)[11]

After extensive recitation of the facts surrounding the release which caused insurance coverage to apply (App. B. pp. 28a-31a), the District Court expressly found the specific basis of Belleville's CERCLA liability and applied that finding to the issue of insurance coverage:

> Belleville has thus established that . . . the *property damage liability which it settled* for the payment of

[11] The contract of insurance clearly supports this analysis in the provision that the policy refers only to "all sums which the insured shall become *legally obligated* to pay as [property] damages because of . . . an occurrence . . ." (App. A. p. 12a) (emphasis supplied).

> $4 million in the underlying action brought by the sovereigns was neither expected nor intended from its standpoint.

(App. B. p. 40a) (emphasis supplied).

The Circuit Court dismissed those specific findings, stating: "Whatever the specific basis of Belleville's liability to the governmental plaintiffs, however, it does not affect our application of the 'sudden and accidental' clause." (App. A. p. 15a.)

For the Circuit Court to acknowledge the fact that Belleville's liability to the government plaintiffs was established in the District Court CERCLA case (App. A. p. 3a), but refuse to apply that trial judge's determination of the basis for that liability in its own decision, violated Fed.R. Civ. P. 52(a).

It is truly significant that the District Court was no stranger to that underlying controversy, having published numerous decisions on most aspects of the government case against Belleville.[12] Perhaps more importantly, that trial judge had ruled in the consolidated case as to Belleville's CERCLA liability.

The Circuit Court's misplaced reliance on Belleville's normal operations is further erroneous since those operations were, as the trial court found, within the ambit of 42 U.S.C. § 9607(j), the CERCLA permit defense:

> At all times material hereto Belleville's operations went forward under the permit application or the formal permit until Belleville ceased doing business in 1978.

(App. B. p. 21a.)

CERCLA liability is premised on proof that a defendant is responsible for a release from a facility of a hazardous substance. 42 U.S.C. §§ 9601 *et seq*. The CERCLA permit defense

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[12] See footnote 6, *supra*.

provides that if releases result from operations which are conducted either under a permit application or a formal permit [42 U.S.C. § 9601(10)], then there is no CERCLA liability associated with said discharges. 42 U.S.C. § 9607(j). Thus, the reliance by the Circuit Court on releases or discharges characterized as "an ordinary part of its business operations" (App. A. p. 15a) was improper; and the analysis should and must be limited to those incidents which were not concomitants of ordinary business activities and, therefore, were beyond the purview of Section 9607(j).

Thus, the Circuit Court's violation of Fed. R. Civ.P. 52(a) and its failure to appreciate the significance of 42 U.S.C. § 9607(j) led it inexorably into error which flagrantly violated *Erie* v. *Tompkins*.

If the present opinion is allowed to stand, the *Sterilite* analysis required by the Supreme Judicial Court of Massachusetts will have been eviscerated, and forum shopping must be pursued by any counsel whose client's position in an insurance action cannot prevail if the specific basis of the insured's liability to a claimant is analyzed. The whole concept of the underlying claimants, the insured, and the insurer all being "bound" by the same specific facts will be irrelevant in a federal trial despite being mandatory in the state courts.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted

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November 26, 1991

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 91-1129

LUMBERMENS MUTUAL CASUALTY CO.,
Plaintiff, Appellee,

v.

BELLEVILLE INDUSTRIES, INC.,
Defendant, Appellant.

No. 91-1130

LUMBERMENS MUTUAL CASUALTY CO.,
Plaintiff, Appellant,

v.

BELLEVILLE INDUSTRIES, INC.,
Defendant, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, *U.S. District Judge*]

Before
TORRUELLA, *Circuit Judge*,
COFFIN AND BOWNES, *Senior Circuit Judges*

T. Andrew Culbert, with whom *Stephen F. Brock*, *Paul Saint-Antoine*, *Drinker Biddle & Reath*, *Michael S. Greco*, *Lisa D. Campolo*, and *Hill & Barlow* were on brief for Lumbermens Mutual Casualty Company.

Thomas W. Brunner, *Carol A. Laham*, *Carol Barthel*, *Stephen P. Keim*, and *Wiley, Rein & Fielding* on brief for Insurance Environmental Litigation Association, amicus curiae.

David A. McLaughlin, with whom *Mary Alice McLaughlin*, *Michael J. McGlone*, *Noreen M. McKenna*, and *McLaughlin & Folan, P.C.* were on brief for Belleville Industries, Inc.

Thomas L. Crotty, Jr., *Peter J. Kalis*, *Thomas M. Reiter*, *James R. Segerdahl*, and *Kirkpatrick & Lockhart* on brief for United Technologies Corporation, amicus curiae.

July 16, 1991

COFFIN, *Senior Circuit Judge*. The question we decide on this appeal is whether a company's general liability insurance policy, which excludes coverage for property damage caused by pollution, nevertheless provides coverage in this particular case under the policy's exception for "sudden and accidental" polluting events. Throughout the four-year period in which the relevant policies were in effect, the insured's manufacturing operations involved continuing pollution-releasing activity. The alleged "sudden and accidental" events occurred on two days during this period, one in 1973 and the other in 1975. We conclude that these events do not qualify as "sudden and accidental" discharges of pollutants and, accordingly, need not reach the trigger of coverage and notice issues that were decided below.

The general liability insurer-appellant is Lumbermens Mutual Insurance Company (Lumbermens). The manufacturer-appellee is Belleville Industries, Inc. (Belleville).[1] In 1973 Belleville acquired an old brick and wood building on the

[1] These are actually cross-appeals. Lumbermens is appealing from the court's award of damages for one "sudden and accidental" discharge, and from rulings determining the event triggering coverage and the timeliness of notice to the insurer. Belleville appeals rulings refusing to award full indemnity based on two asserted "sudden and accidental" releases. We shall, however, refer to the parties in the style we have indicated.

banks of the Acushnet River near its entry into New Bedford Harbor. It carried on the same general process of manufacturing capacitors as had the seller, Aerovox Corporation, for some 26 years. Capacitors are devices which accumulate and hold electric charges. They consist of two oppositely charged surfaces, separated by a dielectric, or insulator. In this particular operation the dielectric was a fluid, "Aroclor," which consisted of a chemical compound, polychlorinated biphenyls, or PCBs. Belleville purchased PCBs from Monsanto Chemical Corporation between 1973 and early 1977, the period when Lumbermens provided general liability coverage for the company. By 1978 the toxicity of PCBs had become so well-recognized that they were outlawed. Ninety-nine percent of the PCBs purchased by Belleville was of a particular kind, Aroclor 1016, which was 99.6% biodegradable. That is, over time most of the pollutant would convert into non-polluting substances, leaving only .4% in a toxic condition.

Late in 1983, the United States and the Commonwealth of Massachusetts brought an action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and other environmental and civil statutes against Belleville and five other corporations, seeking damages and cleanup costs resulting from pollution of the Acushnet River and New Bedford Harbor. In August 1984, Belleville gave written notice of its asserted liability to Lumbermens and demanded that the insurer defend and indemnify the company. Lumbermens denied coverage and subsequently brought this declaratory judgment action to determine its liability under the policies. Meanwhile, it proceeded to defend Belleville. Ultimately, after the district court issued a partial summary judgment for the governmental plaintiffs on the issue of Belleville's liability, the company joined in a consent decree requiring it to pay $4 million.

These are the salient provisions of the relevant insurance policies:

— Lumbermens' basic undertaking was to pay "all sums which the insured shall become legally obligated to pay as [property] damages because of . . . an occurrence . . . .";
— The coverage-invoking event, an "occurrence," is "an accident, . . . which results in . . . property damage neither expected nor intended . . . .";
— But coverage is excluded for "property damage arising out of the . . . release . . . of . . . pollutants into or upon land, the atmosphere or any water course or body of water;"
— "[B]ut this exclusion does not apply if such . . . release . . . is sudden and accidental."

The Prior Proceedings. In dealing with the first of several rounds of summary judgment motions in the declaratory judgment action, the district court, though looking on the exclusion provision as "straightforward," refrained from issuing judgment because of its perception that state law precluded any judgment where the underlying claimants, the governmental plaintiffs in the original lawsuits, would not be bound. Subsequently, as we have noted, the sovereigns obtained partial summary judgment on liability in the underlying action. The court, however, continued to question its power to issue judgment in the declaratory judgment action and therefore denied all of Lumbermens' motions for summary judgment. It then certified several questions to the Massachusetts Supreme Judicial Court.

The only question relevant to our discussion sought to determine the meaning of "sudden" in the policy provision creating an exception to the exclusion of coverage for pollution damages. Courts had been divided over whether the term was ambiguous and thus could be interpreted simply as "unexpected," making it potentially applicable to gradual releases of pollutants. The Supreme Judicial Court responded that the term was not, in its view, ambiguous, and "that when used in

describing a release of pollutants, 'sudden' in conjunction with 'accidental' has a temporal element." *Lumbermens Mutual Casualty Co.* v. *Belleville Industries, Inc.*, 407 Mass. 675, 680, 555 N.E.2d 568, 572 (1990). It added, "[s]urely, the abruptness of the commencement of the release or discharge of the pollutant is the crucial element." 407 Mass. at 681; 555 N.E.2d at 572.

Lumbermens then filed new motions for summary judgment, in response to which Belleville proffered a number of alleged "sudden and accidental" events that it claimed mandated coverage under the policies.[2] The court rejected most of Belleville's candidates for the "sudden and accidental" exception, ruling that the vast part of the damages was attributable to gradual pollution. Belleville then voluntarily limited its claim to discharges from two allegedly "sudden and accidental" events: a very heavy rainstorm in 1973 and a fire in 1975. On these issues, the parties proceeded with a nine-day, jury-waived trial.

The relevant evidence for present purposes concerns Belleville's manufacturing scenario and process, the magnitude of the rainstorm and its discharges, and the nature of the fire and resulting discharges.

The Manufacturing Process. Aroclor oil, i.e., liquid PCBs, was delivered to storage tanks in the basement of the plant. It was then pumped up to impregnation tanks on the second floor. Aluminum capacitor canisters were then lowered in wire baskets into hot Aroclor oil for a two-day "impregnation" period. The oil then was piped back downstairs to dirty oil storage

[2]They were the following: (1) a "catastrophic tropical storm" on December 16-17, 1973; (2) a 1975 500-gallon spill in the pump room, caused by an overflow in transferring Aroclor from one tank to another; (3) a fire in 1975; (4) the bursting of steam or manifold jackets on impregnation tanks, happening once or twice a year; (5) a break in the water main, flooding the parking lot, which had been surfaced with waste oil; also three or four storms a year flooding the lot "up to your ankles"; and (6) spills in transferring Aroclor from tanker trucks to storage tanks; and five-gallon spills of Aroclor in transferring from rail car to tanker car, occurring once a year.

tanks in the pump room, filtered, and then piped to the original storage tanks for reuse. At the same time, the wire baskets containing the impregnated capacitors were removed from the tank.

Although a drip pan was used to catch oil dripping from the baskets, drips and spills on the pump room floor occurred and were sprinkled with Fuller's earth to absorb them or mopped or squeegeed into sump pits. The contents of the sump pits were pumped into the north trough outside the plant, which led to the Acushnet River. PCBs routinely were dispersed through the north trough, the municipal sewer system, the emission of PCB vapors (which condensed as waxy residues on the plant roof, walls, ground, pavement, and parking lot), and through the leaching of PCB-contaminated waste, such as "reject" capacitors dumped on the ground and on the mud flats of the Acushnet River. During manufacturing, Aroclor in vapor form also was released into the atmosphere by exhaust fans.

The Rainstorm. On December 17, 1973, a violent rainstorm deposited 5.31 inches of water in 24 hours. One person said it had been exceeded only by Hurricane Carol in 1954; an expert's testimony was that a storm of this intensity occurred only once in seven years. Streets were flooded. Inside the plant, was flooded into a shipping area and surrounded an elevator pit, both of which were located on levels below the pump room. Water depth was no greater than one to one-and-a-half inches. Eyewitnesses reported that the pump room was not reached by any waters but that in an adjacent area on the same level, water spurted up through the floor in six-inch geysers; it did not accumulate there but drained down a ramp to a lower level where the shipping-receiving office was located. There the water at its deepest was no more than two inches; employees worked for 90 minutes to two hours cleaning up, by pushing the water into a sump pit with mops and squeegees.

The Fire. On September 24, 1975, a fire broke out in a ventilator shaft leading from the tank room to the roof. Firefighters used powerful hoses, which sent spray up to and through the roof, and caused water to flow down the stairwell and into the impregnation room. They also demolished part of the roof and building to put out the fire. Aroclor, which had accumulated on the walls, floors, and roof of the plant, was released both through the roof — eventually landing on and running off the parking lot — and down the stairs, where it was released via the sump pits.

While there was evidence of the heavy flow of water from the hoses, there was no evidence of the duration of the flow or whether the relevant releases were particularly noteworthy. The product manager observed "a stream of water coming down like a waterfall." The vice president for manufacturing, who was at the rear of the plant at the beginning of the fire, found the fire had been extinguished when he reached the site. He saw the water draining into the sump pits two or three feet below ground level. Another employee reported seeing "a lot of water . . . in the aisles" that had been cleared up by the following day.

The District Court Decision. Addressing the rainstorm discharges, the district court first rejected as a "sudden and accidental" release any movement of PCBs from the mud flats to other areas of the harbor. It reasoned that although the storm may have speeded up the process, the process itself was a natural one, the water and wind spreading the PCBs. Being natural, it could not "be considered sudden as that word is used in construing the pollution exclusion under the laws of Massachusetts." Opinion at 19. In any event, it was not accidental, added the court, since Belleville had never taken any steps to reclaim or protect the flats.

As for releases from the interior of the plant, the court rejected any outflow of water through cracks in the floor because a release "by the natural progression of the flow of under-

ground water" is not accidental, *id.* at 22. It also rejected any release caused by the pumping of water from the sump pits, for pumping is intended, not accidental.

The court did, however, on its own initiative, find one type of release to be both sudden and accidental. Although the plant has been reconstructed since 1973, the court inferred that there must have been a door at the first level on the eastern side to give access to both the parking lot and the tidal flats. It further reasoned that PCB-bearing water "receded under and around that door," *id.* at 21. This release was sudden, being caused "by operation of flood waters themselves rather than through any natural underground waterflow or natural erosion of sediments within the harbor"; it was "accidental in the sense that the release was both unexpected and occurred without the assistance of any human agency." *Id.* at 23. The court had earlier, in ruling on Lumbermens' motion for judgment at the end of Belleville's evidence, explained, "And I believe that the accidental event . . . meets the standards of the insurance policy, at least until such time as the rushing flood waters recede to the level where manmade pumps, manmade drainage ditches, sump pumps and the like, take over." App. III at 883.

The court rejected as accidental any discharge attributable to the use of the fire hoses. The running off of water from the parking lot or through the storm sewers was not accidental because this was "the normal fashion of rainwater." Opinion at 27. And the release of water from within the plant by the sump pumps was not sudden because the pumps "operated in the fashion they were intended to," *id.* at 28, and not accidental because use of the sump pumps was intentional.

While there were other rulings made by the court, there is only one other which is relevant to our discussion — its ruling on damages. It placed on Lumbermens the burden to prove the percentage of damage attributable to covered and uncovered risks. It noted the difficulty in such a complex factual situation

as this case presented, but observed that the present record made possible a reasonable allocation. It reasoned that virtually all of the pollutants washed out by the 1973 storm were Aroclor 1016, and that by 1983, the threshold year for liability under CERCLA, only .4% of the pollutant remained. It then multiplied the total damages paid by Belleville by .004, and awarded Belleville an indemnification from Lumbermens of $16,000.

Discussion

We defer, of course, to any factual findings of the district court. Indeed, there is no issue as to underlying facts. The only dispositive issue is whether the underlying facts establish "sudden and accidental" releases within the intendment of the policies. This is a question of law that we must decide *de novo*.

In setting forth the heroic efforts of the district court to be scrupulously fair and to honor the traditional solicitude given insureds, we also have revealed the Augean labors inherent in microanalysis in a case of this kind. The nature of these efforts, together with a contextual view of the policy language and consideration of relevant case law, persuades us that the "sudden and accidental" exception should not be construed to provide coverage in these circumstances — and in other words, when the discharges consisted of long accumulated, unattended, and unsegregated pollutants, and were caused by events not clearly beyond the long-range reasonable expectation of the insured. When, in the case of an insured whose operations involve a likelihood of continuing polluting releases, a court might properly identify a sudden release so beyond the pale of reasonable expectability as to be considered "accidental," we need not decide. We have been told that the particular policy language we must deal with here is no longer in vogue. Happily, courts may be spared further line drawing in this area.

Our analysis begins with an effort to discern the sense of the policy provisions that first exclude damages occasioned by pollution and then carve out an exception for "sudden and

accidental" releases. It continues with a survey of some of the problems encountered in a microanalytical approach. And it concludes with a look at relevant case law.

Our reading of the two pollution provisions in the policy suggests that in the "ordinary" case, i.e., a case involving a "clean" operation, such as an office building housing company headquarters, insurers were willing to commit to covering a possible but unlikely event resulting in the release of pollutants. A coverable occurrence would be clearly identifiable as "sudden and accidental" because it would be marked departure from normal operations. But in the case of a pollution-prone operation, where the emission of pollutants is part and parcel of the daily conduct of business, there is the possibility of infinite variations on the usual theme; i.e., polluting incidents are likely to occur that are on the fringe of normal operations but that the company seeks to characterize as sudden and accidental. As this case illustrates, determining where along the spectrum of polluting events coverage should begin is a perplexing and, ultimately, unsatisfying endeavor. We think it illogical to believe that insurers intended through the "sudden and accidental" exception to buy into a risk and/or litigation package of this nature. *See New Castle County* v. *Hartford Accident and Indemnity Co.*, Nos. 89-3814, 90-3012, 90-3030, slip. op. at 94 (3d Cir. Apr. 30 1991) (referring to "the insurers' underlying intent to distance themselves from deliberate polluters — i.e., those who intentionally or knowingly discharge pollutants into the environment").

More important than our bare reading of the language, however, is the actual spectrum of problems, revealed in this case, that stem from microanalysis of a continuous pattern of pollution. The district court's focus on the means by which the PCBs were spread, as a way of identifying "sudden and accidental" pollution, strikes us as a well-meaning but ill-fated effort to distinguish between virtually indistinguishable occurrences. The court concluded that "sudden and accidental" cov-

erage would be unavailable if releases take place through intended or manmade devices and also if releases follow natural underground watercourses. But, as Belleville asks, "[i]s damage resulting from [manmade] automatic sprinklers triggered by a fire not accidental?" Similarly, is a discharge of pollutants necessarily expected simply because the release happens to travel a natural route? We think not.

Moreover, the court seemed, to some extent, to merge the concepts of sudden and accidental. For example, the court found the release of storm water by the sump pumps not be sudden because the pumps were working as intended, and not accidental because the use of the pumps was intentional. We also have problems with the court's double jump — the first to an inferred door on the first level of the eastern face of the plant; the second to water moving under and around that door.

A more generic problem lies in determining what is sufficiently expected. In this case an expert witness had testified that storms of the intensity of that experience in 1973 occurred no more frequently than once every seven years. Putting aside the thought that events which occur over time with some regularity, like the onset of locusts or gypsy moths, may be said to be expected, we wonder whether a one-in-four-years storm would qualify as unexpected. What about a one-a-year deluge? From a microanalytical viewpoint, almost any event can be labelled unexpected, since history probably never repeats itself precisely. But such an approach would eviscerate the exclusion for pollution.

Perhaps the best evidence of the infeasibility of attempting to assess discrete "fringe" events, in the case of a company with a history of contributing over a lengthy period to a gradual accumulation of pollutants, is the catalogue of "sudden and accidental" discharges submitted by Belleville. *See* note 2 *supra*. Other similar litigable possibilities would include an employee tripping and spilling Aroclor oil, a drip pan giving way, a pipe breached . . . . The prospect is limitless.

One final problem is that of determining the percentage of damage caused by uninsured releases and damage caused by insured "sudden and accidental" releases. In this case the court made a calculation by multiplying a *quality* of the (covered) pollutant (.4%) and the amount of total damages paid by Belleville ($4 million). Only if we knew what percent of the total pollution (post-CERCLA) caused by the nonbiodegradable residue of Aroclor 1016 was attributable to the 1973 rainstorm runoff around the east side door would we have a figure to multiply with the damages total. But apart from calculations, and the inherent problems of proof that allocation would involve, there is a more basic problem. Belleville argues that the policy language leaves no room for allocation. Once Lumbermens is found obligated to cover a "sudden and accidental" release, Belleville argues, the policy requires it to pay "all sums." The complete wording, however, is "all sums which the insured shall become legally obligated to pay as [property] damages because of . . . an occurrence . . . ." Whether this language permits allocation we need not decide. But we do observe that if Belleville's interpretation were correct, the result would be that of a very small tail ragging a very large dog; in this case, the flow of storm waters around a door for a few hours at the most would be sufficient to make Lumbermens indemnify Belleville for four years of pollution at a price of $4 million.

This range of practical problems reinforces our view, based on a common sense reading of the policy language, that the "sudden and accidental" exception to the pollution exclusion was not designed to operate in circumstances such as those existing in this case. We draw further support from the strong body of case law rejecting insurance coverage where a company has for a lengthy period of time purposefully and regularly been carrying on operations involving continual pollution.

In *Great Lakes Container Corp.* v. *National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984), although the precise issue

of "sudden and accidental" releases was not raised, we had no difficulty in holding at an insurer whose insured was described as discharging chemical pollutants on its land "as a concomitant of its regular business activity," *id.* at 33. had no obligation to defend or indemnify in light of the "type of activity" described. *Id.* at 34.

Other circuits have used a similar formulation. In *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 42 (2d Cir. 1991), dealing with a scrap metal processing and storage business with a 33-year history, the court said that it was "doubtful whether the continuous discharge of pollutants resulting from the purposeful operation of a scrapyard can be construed as accidental." That same court made a more emphatic statement a year earlier in *EAD Metallurgical, Inc.* v. *Aetna Casualty & Sur. Co.*, 905 F.2d 8, 11 (2d Cir. 1990): "damage[ ] resulting from purposeful conduct [ ] cannot be considered 'accidental.'" *United States Fidelity & Guar. Co.* v. *Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988), involved a coal loading operation that had been in business for many years, loading as many as five or six 60-car trains a week. A great amount of damaging coal dust had been discharged during a period of seven or eight year when crushed coal unintentionally dropped from the conveyor belt. The court, viewing these incidents "as a normal part of the coal processing operation," held that it was "impossible to characterize these discharges of dust as 'sudden'": "[t]he 'sudden and accidental' exception to th[e] exclusion is inapplicable here where the pollutants at issue were discharged on a regular ongoing basis." *Id.* at 35.

More specific rulings, in cases where parties attempted to distinguish discrete episodes of pollution from ongoing activity, have been made by a number of federal district courts and state intermediate appellate courts. *Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 750 F. Supp. 1340 (E.D. Mich. 1990), involved a manufacturer of instrument panels that generated both solid and liquid wastes that entered groundwater. The

company, much like Belleville, sought coverage for a tank spill in 1977 and a pipe rupture in 1978. The court held that even if these incidents and damage therefrom could be proved, they were "expected." *Id.* at 1350. The insurer had proved that "international practices, including disposal of waste water into the Pokamoonshine Brook tributary; subsequent disposal to the north end of the plant site; and finally disposal into the lagoon system, resulted in groundwater contamination." *Id.* at 1350-51. In other words, "[t]he evidence support[ed] insurers' theory that policyholders expected property damage to result from their day-to-day manufacturing processes." *Id.*

A year earlier the same court had faced the same set of issues. In *Ray Industries, Inc.* v. *Liberty Mutual Ins. Co.*, 728 F. Supp. 1310 (E.D. Mich. 1989), a boat manufacturer had, for 13 years, relied on a contractor to deposit 55-gallon drums of waste in a landfill. In the process some barrels were punctured and crushed. In responding to the insured's argument that discrete sudden and accidental releases occurred each time a barrel was smashed, the court held: "because . . . discharges took place continually and regularly for approximately thirteen years, they were not sudden and accidental." *Id.* at 1318.

The absence of suddenness was the basis for the holding in *Industrial Indem. Ins. Co.* v. *Crown Auto Dealerships, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990). In this case a recycler of used crankcase oil stored waste oil sludge in unlined storage ponds. Chemicals leached, spills and leaks occurred, and there was occasional runoff of rainwater. The court viewed the pollution as gradual and the normal result of the recycler's 29 years of operations. The alleged incidents were "clearly cumulative," *id.* at 1521. "Consequently, the leaching and occasional spills of chemicals and runoff from sludge ponds during major rainfalls cannot be classified as abrupt or sudden events." *Id.* Similarly, in *Fischer & Porter Co.* v. *Liberty Mutual Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986), a tank spillage was not sudden and accidental because it was "part

of the regular conduct of the insured's business." *Id.* at 136. Even if employees dumped the pollutant, "pollution resulted from voluntary acts within the regular, routine business operations." *Id.* at 139.

A recent state court case is *Outboard Marine Corp.* v. *Liberty Mutual Ins. Co.*, Nos. 2-90-0349 and 2-90-0399 (Ill. App. Ct., 2d Dist. Jan. 31, 1991) (1991 Ill. App. LEXIS 126). In that case the insured had, for over a decade, discharged PCBs into "North Ditch" leading into Waukegan Harbor. In trying to establish the exception to the pollution exclusion clause, the insured offered evidence that the harbor contamination "could have resulted from one or more events . . . such as a major rainstorm, a flood, or a fire." LEXIS at 34. The court held that there is "nothing sudden about discharging pollutants over an 11-year period." *Id.* at 39.

Belleville cites no cases supporting its theory. It attempts to distinguish most of the cases cited above by asserting that they did not involve an insured that was discharging pollutants, as it was, under a federal permit. *See* 42 U.S.C. § 9607 (j) (federally permitted release exception to CERCLA liability). Belleville's point in emphasizing its permit is hard to decipher. We think that what it intends us to understand is that, because of the permit, its liability in this case cannot stem from "regular business discharges into the harbor" but only from the releases associated with the rainstorm and fire. Thus, the fact that it was a regular polluter should not enter into our analysis.

Whatever the specific basis of Belleville's liability to the governmental plaintiffs, however, it does not affect our application of the "sudden and accidental" clause. It is, rather, the nature of an insured's enterprise and its historical operations that determine the applicability of the policy provision. Belleville discharged pollutants as an ordinary part of its business operations; we simply cannot analyze these provisions as if it were a manufacturer of health foods that rarely, if ever, experienced a pollution-producing event.

We therefore AFFIRM the judgment below except its declaration that Lumbermens is liable under the 1973 policy; we REVERSE its judgment of liability under the 1973 policy.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LUMBERMENS MUTUAL CASUALTY COMPANY Plaintiff, V. BELLEVILLE INDUSTRIES, INC., Defendant.	Civil Action No. 84-2676-Y New Bedford Harbor Cases Consolidated Civil Action No. 83-3882-Y

FINDINGS AND RULINGS OF LAW

Lumbermens Mutual Casualty Company brings this action to obtain a declaration of its obligations under insurance contracts it issued to Belleville Industries, Incorporated. The occasion for this insurance declaratory judgment action is the fact that, on December 10, 1983, the United States and the Commonwealth of Massachusetts brought an action against several corporations, including Belleville, alleging that all those corporations are liable for damages under the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other provisions of federal and state law for the polychlorinated biphenyl pollution of New Bedford Harbor. Belleville settled this underlying pollution action with the sovereigns, subject to the Court's approval of the appropriate consent decree, for the payment of $4 million. Lumbermens, who provided Belleville with the funds for its defense of the underlying action, denies any duty to indemnify Belleville for this payment to the sovereigns. Belleville here seeks to recover the $4 million paid in settle-

ment. There is here no dispute but that the settlement with the sovereigns is in all respects reasonable and proper.

This insurance action was tried jury waived over seven days from November 13, 1990 to November 29, 1990. The Court delivers its findings and rulings from the bench in order that all the parties may promptly understand that Court's conclusions concerning the facts and its reasoning about the law which governs the parties' obligations. The court reserves its rignt to expand on the legal analysis should further proceedings eventuate and to grammatically correct, reorder, and generally clean up its discursive fact finding. No factual finding will, however, be substantively altered, the court intending this dictated opinion to provide full compliance with Federal Rule of Civil Procedure 52 and to enable the prompt entry of judgment herein. The requisite findings of fact and conclusions of law follow.

Lumbermens Mutual Casualty Company is a mutual insurance company organized and existing under the laws of the State of Illinois with is principal place of business at Long Grove, Illinois. At all relevant times Lumbermens has been engaged in the business of issuing contracts of primary and excess liability insurance and is licensed to do business in the Commonwealth of Massachusetts.

Belleville Industries, Incorporated was incorporated in 1972 in the Commonwealth of Massachusetts with its principal place of business at 740 Belleville Avenue, New Bedford, Massachusetts.

Lumbermens brought this declaratory judgment action under 28 U.S.C. Sections 2201 and 2202 to obtain a declaration of rights and obligations under certain contracts of liability insurance issued by Lumbermens to Belleville. Lumbermens and Belleville had entered into contracts for primary and excess liability insurance that provided $10 million coverage for Belleville for the periods from 1973 through 1975, inclusive.

Subject matter jurisdiction exists under 28 U.S.C. 1332(a)(1), since the matter in controversy exceeds the value of $50,000, exclusive of interest and costs, and there is diversity of citizenship between Lumbermens and Belleville.

Venue is proper in this Court under 28 U.S.C. Section 1391(a) and (c) since both Lumbermens and Belleville, for purposes of venue, are residents of the Commonwealth of Massachusetts.

Moreover, the law of the Commonwealth of Massachusetts governs the substantive issues in this action. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

The insurance policies issued by Lumbermens to Belleville were standard form comprehensive general liability policies. The insuring agreement of the Lumbermens policies states in part that, "The insurer will pay on behalf of the insured all sums which the insured shall become legally liable to pay as obligated to because of . . . property damage to which the insurance applies, caused by an occurrence."

The insurance policies define "occurrence" as: an accident, including continuous or repeated exposure to conditions which results in . . . property damage neither expected nor intended from the standpoint of the insured.

The insurance policies define "property damage" as: (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

During each of the three policy years in question exclusion (f), the pollution exclusion, stated that the insurance will not apply to property damage arising out of releases of products deemed contaminants except for releases that are sudden and accidental.

The Court took an extensive view of the facility which included a tour of the perimeter of the property, examining the tidal flats and observing the areas of the north trough and the south trough. During the view the Court not only toured interior sections of the plant but also observed manufacturing operations which were substantially similar to the operations conducted during the period in controversy. Detailed attention was paid to the area in which the fire, discussed below, occurred and areas adjacent thereto.

Belleville was the owner and operator of a manufacturing plant and associated property in New Bedford, Massachusetts, from January 2nd, 1973 until October 27, 1978. The facility in question was, at all times material hereto, utilized to manufacture electrical capacitors for use by industry in products utilizing electrical power. This manufacturing process at the facility by Belleville followed a long-term manufacturing process similar in nature which had earlier been carried on for years by AVX, Incorporated. Polychlorinated biphenyls (PCBs) were used in that manufacturing process since they afford a greater protection from fire and provide greater safety to the consumer than any alternate product. Belleville used PCBs in its manufacturing process at the Aerovox plant from January 2nd, 1973 until January 1st, 1977. Prior to January 2nd, 1973, AVX owned and operated the Aerovox plant and used PCBs in its manufacturing process.

When Belleville purchased the assets of AVX, many former AVX employees continued to work at the plant as Belleville employees. These employees brought to their work at Belleville certain knowledge gained in the course of their employment at the AVX plant while it was owned and operated by AVX prior to 1973. Clifford Tuttle was among the former AVX employees who later worked for Belleville. Tuttle was the Vice President of Sales and Marketing at AVX from 1970 until 1972 when he left to prepare to purchase the company's electrical products division through the newly formed Belleville

corporation. Tuttle was a founder of Belleville and served as its president throughout its corporate existence.

In 1971 AVX applied, pursuant to 33 U.S.C. Section 407, the Refuse Act, for permission to discharge effluent into the Acushnet River. This application under the Refuse Act fulfilled the requirements of the Federal Water Pollution Control Act, 33 U.S.C. 1342(a)(4). The formal permit itself dated May 23, 1975, was forwarded to Belleville which filed its first six months report pursuant to that permit on or about October 17, 1975.

At all times material hereto Belleville's operations went forward under the permit application or the formal permit until Belleville ceased doing business in 1978.

AVX, and later Belleville, obtained PCBs from the Monsanto Chemical Company in the form of blended PCB formulas sold under the trade name Aroclor. Monsanto was the sole source of PCBs to AVX and Belleville. Four types of Aroclors figure in this analysis. These are: 1260, 1254, 1242, and 1016. Aroclor 1260 is the most toxic. That Aroclor was never used at this facility. AVX during its operation of the facility used primarily Aroclor 1254 which was 70 percent nonbiodegradable. By contrast, Aroclor 1242 was seven percent nonbiodegradable, and Aroclor 1016 was only .4 percent nonbiodegradable.

After purchasing the assets of AVX and establishing its own manufacturing process at the facility, Belleville used Aroclor 1016 almost exclusively and Aroclor 1254 only for certain limited applications.

Over the course of its manufacturing at the facility the use by volume of the two Aroclors here involved were: Aroclor 1016, 99 percent; Aroclor 1254, 1 percent.

During the late 1960's scientists became aware that PCBs are accumulated in the tissues of many biological species even when exposure is to very low concentrations of PCBs.

In 1970, Monsanto began to alert AVX to a potential problem of environmental contamination due to PCBs. Over the next several years Monsanto provided continuing information regarding this potential problem to AVX.

On April 10, 1970, and again on July 16, 1970, Monsanto issued press releases describing its six-point program, begun in 1968, to identify and measure PCBs in the environment. The April 10, 1970 press release reported Monsanto's announcement that it was well aware of the concern over possible environmental contamination by PCBs.

During the summer of 1970, two Monsanto representatives, William Papageorge and Randall Graham, visited the AVX facility in New Bedford for the purpose of bringing AVX up to date on PCB environmental problems. Papageorge and Graham informed AVX representatives that they ought keep PCBs out of the water.

Towards the middle or latter part of 1970, Monsanto routinely included the following cautionary statement on its invoices to customers who purchased PCB Aroclors from it, including AVX. This is the statement:

"This product contains polychlorinated biphenyls (PCBs) which some studies have shown may be persistent, an environmental contaminant, and possibly injurious to certain forms of bird, aquatic and animal life. Prevent any entry into the environment through spills, leakage, disposal, vaporization, reuse of containers or otherwise. Spills, leakages, and waste product must be collected."

By January, 1971, John Hutzler, who replaced Abe Kalstein as AVX's manager of product engineering, was aware of the tendency of PCBs to persist in the environment. Kalstein informed Hutzler of the problem of PCB biocumulation in fish and birds. By 1971, Hutzler knew that PCBs posed a danger to bird wildlife.

In 1971, Monsanto replaced the PCB formula known as Aroclor 1242 with Aroclor 1016, a more biodegradable formula.

Monsanto informed AVX that the change to Aroclor 1016 was due primarily to Monsanto's concern about alleged environment hazards relating to PCBs. Monsanto advised AVX that the purpose of Aroclor 1016 is to produce essentially the same characteristics as Aroclor 1242 except that higher chlorinated biphenyls have been removed to help alleviate the PCB pollution problem.

On October 14, 1971, Hutzler sent a memorandum to various AVX employees concerning a visit by two Monsanto representatives. Hutzler noted that there was an increase in published reports of PCB ecology scares and referred to legislation pending before the United States Congress, including one bill that listed PCBs among a long list of materials which are dangerous to the environment, and the second bill which would prohibit all shipment of PCBs.

On December 20, 1971, Hutzler circulated an inter-office memorandum at AVX which stated that Monsanto had been named in a lawsuit seeking damages of $60 million due to alleged PCB pollution.

In late 1971, Monsanto sent to AVX a document entitled "Special Undertaking by Purchasers of Polychlorinated Biphenyls," with a cover letter which stated that PCBs had been found in food and food chains. Monsanto informed its customers that it would no longer supply Aroclor to them unless they signed the Special Undertaking thereby agreeing to indemnify Monsanto for any environmental damages arising from the use of Monsanto's PCBs.

Monsanto's Special Undertaking states that the Buyer: is aware and has been advised by Monsanto that PCBs tend to persist in the environment; that care is required in their handling, possession, use and disposition; that tolerance limits have been or are being established for PCBs in various food products.

It further provided that the Buyer agrees to hold Monsanto harmless for any claim arising out of the use of PCBs, including

any contamination or adverse effect on humans, marine and wildlife, food, animal feed, or the environment by reason of such PCBs.

Along with the Special Undertaking Monsanto sent to Aerovox an article dated October 10, 1970 by one Carl G. Gustafson entitled "PCBs — Prevalent and Persistent."

In describing how PCBs entered the environment, Gustafson refers to the escape of PCBs from manufacturing plants through the plant ventilation and exhaust systems into the atmosphere and through its waste treatment system into sewers or directly into waterways.

Monsanto notified AVX in writing that PCBs are highly stable compounds and are not readily biodegradable. Therefore, when placed in the environment they may be considered contaminants and may adversely affect some species of animal and marine life.

Monsanto warned AVX to take every precaution to prevent any entry of polychlorinated biphenyls into the environment through spills, usage, leakage, disposal, vaporization, or otherwise.

Belleville employees were aware that individuals working in its manufacturing process sometimes developed a skin irritation known as chloracne and reasonably inferred that this irritation or rash was related to the use of PCBs in the manufacturing process.

Since AVX and Belleville believed that no commercially viable electrical capacitor could be made without the use of PCBs, a reliable supply of that chemical was the very life's blood of this industry.

On February 10, 1972, T. Kenwood Mullare, corporate counsel to AVX, drafted a memorandum explaining the circumstances under which AVX had signed the Special Undertaking required by Monsanto as condition of future sales of PCBs. Among other things, Mullare advised that the risks which AVX would take by signing the indemnity agreement

were in part at least uninsurable. The company's general liability policy contains an exclusion, common to the insurance industry, which states that no coverage is provided for damage to the environment except damage caused by sudden and accidental occurrences. Therefore, this insurance coverage, looked at either as product liability or general contractual protection, would not give protection for damage due to a gradual buildup of PCBs in the environment.

On March 21, 1972, Tuttle received a copy of an Aerovox inter-office memorandum which reflected Monsanto's increases in the price of supplying Aroclor 1016. Tuttle was told by Monsanto representatives that increases in the price of Aroclor were due to Monsanto's efforts to deal with concerns about the environmental effect of PCBs.

In April 1972 Monsanto notified Aerovox: We wish to strongly reemphasize with you the importance of avoiding direct or accidental PCB contamination of feed, food and packaging material, and of preventing PCBs from escaping into the environment. We direct your attention to the recent FDA notice of proposed rule making on PCBs. . . . If PCBs are still present at your locations you are urged to thoroughly review your procedures and inspect your facilities to insure that extreme care is taken in the handling, use, storage and disposal of these materials.

Similarly, the 1972 invoices received by AVX from Monsanto contain warnings against allowing the entry of PCBs into the environment due to their persistent and possibly dangerous tendencies.

Late in 1972, Tuttle made an offer to the present of AVX, one Daniel McQuilan, to buy the AVX electrical products division and the New Bedford facility. Tuttle then left AVX to form Belleville, raise capital, and complete the negotiations for Belleville's purchase of AVX's AC oil capacitor manufacturing business.

On December 19, 1972, Belleville purchased all the assets, properties, business and good will of AVX nonceramic capacitor business.

On January 2nd, 1973, Belleville assumed from AVX the assets and liabilities outlined in the previously signed purchase agreement. After buying the AVX assets Belleville continued to make the very same line of AC oil capacitor products that AVX had made at the facility.

From January 2nd, 1973 to January 1, 1977, approximately 90 percent of Belleville's product lines consisted of capacitors containing PCBs. Belleville at all times considered that it ran an environmentally safe, progressive and largely incident free operation.

Over the course of Belleville's manufacturing operations PCBs came to be handled with increasing care until they were finally discontinued altogether.

Over the time when PCBs were used by Belleville they were routinely handled in the following fashion. Aroclor oil delivered to Belleville was transferred into storage tanks in the pump room located in the basement of the plant. From the storage tanks the Aroclor was pumped up into impregnation tanks on the second floor of the plant. After the completion of an impregnation cycle, the Aroclor in the tanks was piped back downstairs into separate oil storage tanks to be filtered. After filtration, the oil was piped back into the original storage tanks for reuse in the impregnation process.

To begin the impregnation cycle, a tank man opens the lid of an impregnation tank and places wire baskets filled with preassembled capacitor canisters into the tank. The tank man then seals the tank shut and draws a vacuum inside the impregnation tank by means of a vacuum pump located in the pump room and connected to the impregnation tank on the second floor. The Aroclor oil is then pumped into the impregnation tank.

After allowing sufficient time for impregnation of the capacitor with Aroclor oil, the oil is cooled by a separate noncontact cooling water system sent around the outside of the tank in an independent piping system. The Aroclor oil left in the tank after the impregnation process is then piped into the so-called dirty oil storage tank. The dirty oil is oil contaminated with water or other impurities due to touching the capacitors. The dirty oil storage tanks are located in the pump room.

After the impregnation process is completed, the tank man opens the tank and removes the wire baskets containing the impregnated capacitors. A drip pan is used to catch the oil dripping from the baskets removed from the tank.

After impregnation, capacitors are taken from the tank room for final process and final heat and voltage testing.

When PCBs were dripped or spilled onto the floor of the pump room, Belleville employees cleaned up the drips or spills by sprinkling Fuller's earth on the floor to absorb the oil or by mopping or squeegeeing the oil into sump pits. The contents of the sump pits were routinely pumped into the north trough until 1974 when the sump pits were disconnected from that trough.

In the course of the manufacturing process at the facility, Aroclor vapors were generated. Exhaust fans at the facility released Aroclor vapors into the air surrounding the facility.

Upon Belleville commencing manufacturing operations at the facility, Monsanto required it to execute a copy of the "Special Undertaking by Purchasers of Polychlorinated Biphenyls" in order to receive a continuing supply of Aroclor. Tuttle, as president of Belleville, signed the Special Undertaking on Belleville's behalf and returned executed copies to Monsanto on January 8, 1973.

During normal weather conditions PCBs that had been routinely placed into and upon the mud flats at the eastern

edge of the facility bordering the Acushnet River during the course of many years of manufacturing operations at the facility by AVX were released into the environment on a gradual, ongoing basis.

An intense tropical storm hit the New Bedford area during the period December 16-18, 1973. In a city with an annual rainfall of approximately 40 inches, this storm deposited 5.31 inches in one 24-hour period. Between 8:00 a.m. and 11 a.m. on December 17th, 1973, more than 2.75 inches of rain fell. Witnesses who had lived their lives in the area were able to identify only one other storm, a hurricane in 1954, which exceeded this 1973 storm in intensity. Expert testimony confirms that a storm of such intensity occurs in New Bedford less than once every seven years.

This storm had two significant effects each of which warrants separate analysis. First, the Court finds that the tidal mud flats just east of the facility, which were covered by waters of the Acushnet River and New Bedford Harbor once during each tidal cycle, were in December 1973, and had been for years before, impregnated with PCBs as a result primarily of AVX manufacturing process over those years that the facility and to a lesser extent by Belleville's manufacturing process since 1972. PCBs discharged into the Acushnet River over the years from the north trough settle out to some degree on the tidal flats. Some PCBs are volatilized, that is, they are dispersed into the air as part of the evaporation process of the water vapor. Some are suspended in the water, but each tidal cycle suspended less since the PCBs being heavier than water tend to settle out. Certain of the PCBs may be found in the fluff, that is, the interface between the surface of the tidal flats and the water, that is, that portion of the tidal flats approximately one millimeter thick which tends to be stirred up by the flow of water across the flats. Others come to be deposited more deeply into the tidal flats themselves, although a process of

bioturbation tends gradually to move PCBs toward the surface of mud flats where they have been deposited due to biological activity. A few millimeters of material gets resuspended each tidal cycle.

The geography of the area itself must also be considered. The Belleville facility is located on the west bank of the Acushnet River where that river widens out to merge with New Bedford Harbor. Not far north of the facility the river is only 30 to 40 feet wide. But in the area of the facility is a hundred to one hundred fifty feet wide with mud flats on the western bank and marshlands on the eastern. During the storm the mouth of the river turns into a sluiceway. This is precisely what happened during the storm of December 1973.

In view of the extraordinary rainfall, streamflow at the mouth of the Acushnet River increased tenfold with an accompanying increase in the velocity of the water flowing over the PCB impregnated tidal flats. Indeed, the velocity of flow can be calculated to have reached 30 centimeters a second. This is a significant increase over average ambient conditions and indeed does not take into account the effect of the wind on the surface of the water. Had that wind effect been calculated as well the velocity of the water over the surface of the flats would increase. Assuming an area of PCB impregnated tidal flats of 33,000 square feet, approximately 140 pounds of PCBs were moved by the force of this storm from the mud flat surface where they had previously been deposited to other areas of the harbor floor either not yet tainted by PCBs or not yet tainted to the extend as existed after this storm.

The movement of these PCBs from the tidal flats which are owned by Belleville other areas of the harbor constitutes a release of a contaminant which subjects Belleville to liability under CERCLA. Accordingly, Belleville argues that the release occasioned by the 1973 storm was both sudden and accidental and since it is outside the reach of the pollution exclusion

Lumbermens must indemnify Belleville for the liability occasioned by such release. The Court disagrees.

This process, the Court concludes, was neither sudden nor accidental. Rather, it was a natural process of spreading PCBs caused by the gradual movement of the molecules due to the water and the wind. True, the December 1973 storm may have speeded up the process but the storm in no way changed its character. The natural movement of PCBs from tidal flats owned by the facility into other areas cannot be considered sudden as that word is used in construing the pollution exclusion under the laws of Massachusetts. Even if the process were sudden, however, it certainly was not accidental. The PCB impregnated tidal flats were never the subject of any protective, reclamation, or conservation efforts by either AVX or Belleville.

Indeed, AVX appears to have dumped defective capacitors onto the tidal flats and allowed them to rust out thus releasing the PCB impregnation into the environment. Belleville for its part, while it may have taken steps to improve the nature of its operations within the facility, did nothing about the tidal flats. It took no steps, commenced no reclamation process. In short, it established no standard or routine of procedure against which this storm could in any way be considered an accident. What happened in December 1973 on the tidal flats was the natural consequence of years of improvident PCB disposal.

The second aspect of the storm concerns what happened within the plant itself. During the height of the storm the streets around the facility were flooded. Indeed, in one area of Belleville Avenue a rowboat was seen to make its way along the street.

Inside the plant the water table rose, first flooding an unused elevator pit, next flooding the sump pits, and finally, rising to a height where the entire floor of the storage area locker room and shipping area was inundated.

Electrical power failed. In the darkness, jets of water, six inches high, started up through cracks in the floor of the pump room where the Aroclor oil tanks were located. These jets of water were occasioned by the extent of water pressure from the rising water table below and around the plant. In the boiler room, which was a higher level, employees took care to tighten the stuffing boxes of the boilers.

As the waters receded they took with them, in suspension, certain molecules of PCBs which were washed from the floors and the lower walls of the interior of the facility by the flooding itself. Certain of these PCB molecules flowed out around the door or doors which the Court infers were located at the eastern end of the facility. At present, there is a door at that eastern end of the facility which gives access to a storage area. However, during the view the Court was informed, and it is not disputed, that the eastern face of the facility has been reconstructed and does not now exist in the manner as it stood in December 1973. Nevertheless, given the need to have access to the parking lot from that end of the facility, as well as to have access to the tidal flat area, the Court infers that in December 1973 there was at a minimum a pedestrian door located on the first level of the plant. Flood waters receded under and around that door carrying with them PCBs washed from the floor and walls of the facility. Other PCBs were mopped up and pumped out of the facility once the sump pumps were returned to operation. Still other PCBs left the plant as a consequence of the December storm when the water receded back down through the cracks in the plant's floor carrying with it the PCBs released from the interior of the facility.

All these various releases of PCBs from the area of the facility subject Belleville to liability under CERCLA. Only one type of release, however, is sudden and accidental so as to subject Lumbermens to liability. The outflow of water through cracks in the floor is both sudden and accidental, but

that outflow does not constitutes a release. PCBs working their way out through the cracks in the floor find themselves under the plant and part of the normal underground water system. Those PCBs which worked their way through that system to be released from the geographic boundary of the facility were not released in a sudden or accidental manner. Rather, they were released by the natural progression of the flow of underground water. As there is nothing accidental about such flow, such a release of PCBs falls within the pollution exclusion.

Likewise, the restarting of the sump pumps qualifies as sudden. Indeed, there appears to have been an emergency in the plant. Starting the pumps constitutes the first and most effective line of defense. Pumping out PCB impregnated water into the environment is not, however, accidental. The PCBs leached from the floor and walls of the plant and suspended in the flood waters did not escape from the facility by accident in this manner, rather, they were pumped out in an attempt to dry out the plant's interior. The nonaccidental nature of this conduct can best be understood were the PCBs in this case to be analogized to radioactive elements in a nuclear power plant. A mishap in a nuclear power plant which resulted in the intentional pumping out of radioactive impregnated water would hardly be considered an accident. The sole escape of PCBs which does qualify both as sudden and accidental are the PCBs which escaped over the transom and around the door in the eastern face of the facility as the flood waters ran out of the basement as part of the receding flow of the Acushnet River into New Bedford Harbor.

This escape of PCBs was sudden. After all, the release was by operation of flood waters themselves rather than through any natural underground waterflow or natural erosion of sediments within the harbor. What's more, it was accidental in the sense that the release was both unexpected and occurred without the assistance of any human agency.

The Court therefore rules that solely with respect to that relatively small discharge of PCB impregnated water into the Acushnet River and New Bedford Harbor, Lumbermens is liable under the terms of the policy then in effect to indemnify Belleville.

By 1974, Belleville knew that some ecologists considered PCBs to be dangerous to the environment. And at a spring meeting of the Electronics Industry Association Tuttle learned that the United States Environmental Protection Agency was planning to issue regulations with respect to PCB usage. Tuttle discussed the matter with others at Belleville since they recognized that some release of PCBs into the environment was an inevitable result of the manufacturing process used at that facility and that if Belleville continued its normal use and handling procedures in its manufacturing operations it would not be able to meet the government's proposed discharge standards for PCBs.

In March 1974, Tuttle notified Monsanto that Belleville wished to take advantage of Monsanto's offer to analyze Belleville's discharges of PCBs. Accordingly, Monsanto began to test Belleville's discharge samples for PCBs.

On August 6th, 1974, Tuttle wrote to his congressman, the Honorable Gerry E. Studds, to request assistance in obtaining a three year grace period or delay in the enforcement of certain proposed federal regulations regarding the use of PCBs.

On October 10, 1974, Monsanto returned to Belleville the results of its analysis of effluent samples taken from the facility which analysis reflected the presence of Aroclor 1016 and Aroclor 1254 in Belleville's liquid discharges.

On October 25, 1974, Norman Butterworth, the environmental control officer at Belleville, circulated a memorandum regarding Aroclor handling procedures. The memorandum stated in part that PCBs are deemed by some ecologists to be very dangerous to the environment since they are essentially

nonbiodegradable and can accumulate in the fatty tissues of fish, birds, et cetera. The memorandum was intended to bring home the realization that this material, i.e., PCBs, must be handled carefully if we are to prevent very serious future problems.

In 1974 Tuttle formed the Electronics Industry Association PCB AD Hoc Committee. He served as chairman of this committee for the next several years directing its efforts towards lobbying to reduce the proposed PCB discharge standards being considered by EPA and Congress. Throughout 1975 Tuttle regularly sent letters to the members of the committee and prepared and circulated the minutes of the committee meetings. Tuttle circulated various information concerning the proposed federal regulations of PCB use, including the revised EPA advance notice on the proposed rule making for toxic pollutant effluent standards. He also collected information regarding the PCB use and discharge levels of other members of the capacitor manufacturing industry. During this period Belleville continued to monitor its own PCB discharge levels regularly.

On September 24, 1975, a fire broke out in a wooden ventilation shaft which led from the tank room on the second floor of the plant to the sawtooth area of the roof. The fire was caused by a malfunction in a fan and motor that were housed in the ventilation shaft. The shaft as directly above a partially enclosed stairway between the impregnation room and the vacuum pump area of the floor below. Due to the proximity of the impregnation room and the location of the vacuum pumps, there were concentrations of Aroclors on the walls, roofs and floors of the plant in the vicinity of the area of the fire. Belleville personnel were unaware of the fire until notified by employees of a company located nearby, which employees notified the New Bedford Fire Department.

In order to extinguish the fire, the New Bedford Fire Department had to utilize two-to-three man hoses from both inside and

outside the plant. The hoses discharged between 375 gallons and 500 gallons per minute and had a pressure at the nozzle head of 50 pounds per square inch. Discharge from the hoses is sufficient to knock over steel targets at 30 feet. The force of the water displaced PCBs which had adhered to the surface of the ventilation shaft.

Firemen went up to the sawtooth roof and used axes and pike poles to remove the roof and adjoining areas of the building in order to totally quell the fire. This further discharged PCBs. Copious amounts of water, likened to a waterfall, flowed down the stairwell and over the vacuum pumps. Water also poured through the impregnation area where PCBs were utilized to fill the capacitors. This caused release of PCBs into the water from the fire hoses.

Belleville contends that this event gave rise to the sudden and accidental release of PCBs into the environment. Once again, the specific nature of the releases must be analyzed. First, it is true that the force of the water from the firefighters' hoses, especially those directed upwards from inside the plant, caused a spray of PCB impregnated water to be released into the environment above the facility. For aught that appears, however, this release was but momentary. True, it was sudden and accidental, but momentary.

There is no credible evidence that the flume of water shot up from inside, fell to earth anywhere other than within the geographic boundaries of the facility. Once there, it ran off the parking lot, or down through the storm sewers, in the normal fashion of rainwater — a release arguably sudden but certainly not accidental.

The water cascading down inside the facility was pumped out by the sump pumps in the normal manner. Here again, while the flow of water within the facility carrying newly moved PCBs was both sudden and accidental, the release of the PCB impregnated water by virtue of the operation of the

sump pumps was neither. It was not sudden since the sump pumps operated in the fashion they were intended to, and had operated for years and years; nor was it accidental. The release was intentional. And the agency of such release was designed by the operators of the facility themselves, i.e., the sump pumps.

The fire, thus, does not fall outside the pollution exclusion in any respect and is not the ground for assigning liability to Lumbermens.

On September 29, 1975, Butterworth responded to the EPA's earlier request for information regarding Belleville's use and disposal of PCBs by providing data regarding the levels of PCB discharges from the facility, the number of pounds of Aroclor purchased by Belleville each year, and the number of pounds of waste Aroclor disposed of each year by Belleville by various methods.

Beginning on November 7, 1975, Butterworth asked all supervisors to rigidly enforce a policy of no discharges or placement so liquids or solids in the north trough except from cooling waters and Hot Tin Room rinsing waters. Butterworth specified that the policy meant there should be absolutely no oil purges, oil placements, degreaser residue placements, sump oil discharges, papers or other debris made into the discharge stream. Butterworth emphasized that it is extremely important that all supervision on all shifts realize that we can no longer tolerate past practices and that failure to enforce our new policy can result in possible fines, possible plant (or operation) shutdown, and very substantial expenditures to correct discharge conditions which we can control ourselves through good housekeeping and good common sense.

A month later Butterworth stated in an inter-office memorandum that it is extremely important that we keep Aroclor losses to the environment at an absolute minimum. Butterworth outlined a series of actions recommended to minimize such losses.

On December 22nd, 1975, EPA issued a press release stating that the United States must move toward totally eliminating the use of polychlorinated biphenyls as rapidly as possible and must in the meantime make ever effort to ensure that PCBs do not enter the environment.

On December 30, 1975, three inspectors from the EPA and one representative of the Massachusetts Department of Environmental Quality Engineering, visited the facility to prepare for the sampling of its liquid discharges. The visit, attended by Tuttle and Butterworth, included a tour of the facility's Aroclor handling operations and the north trough where PCB sampling was conducted.

In January 1976, the EPA began its first sampling of liquid discharges from the facility, and at the same time began testing the waters of New Bedford Harbors for PCB content. Results from sampling conducted by the EPA in January 1976 found that the facility was discharging up to 9.9 ounces of PCBs daily.

On March 1, 1976, Butterworth notified Belleville management that analyses performed by the EPA of various discharge samples taken at the facility showed a PCB level of 50.6 parts per billion in discharges from the north trough. The EPA continued to monitor the PCB discharges from the facility in 1976 and Belleville also continued to conduct its own sampling program. Belleville repeatedly received analytical results which confirmed the continued presence of PCBs in Belleville's effluent discharges.

Throughout the spring of 1976 Belleville knew that the EPA planned to regulated PCB discharge levels from the facility. Belleville executives took steps seeking to delay or liberalize the proposed PCB discharge levels claiming that they were "unrealistic at this time."

During that same year, Belleville, believing there were PCBs in the concrete which lined the north trough that ran alongside the northern outer wall of the plant down to the mud flats of

the Acushnet River, lined the trough to prevent the leaching out of PCBs from the concrete. Belleville also set up a waterless hand cleaning station at the facility to help minimize the entry of Aroclor into the environment.

On September 17, 1976, Tuttle sent a letter and several newspaper articles concerning the discovery of PCBs in the Acushnet River and New Bedford Harbor to Marshall Butler, the president of AVX. Tuttle's letter was drafted by Belleville's outside counsel, Bert Putman, Esq., and reviewed by Belleville's chief financial officer, Ronald Murphy before it was sent to Butler.

The letter reflects Tuttle's anticipation that at some point that state might pursue a course of action mandating a cleanup of the river and an assertion of liability against past users of PCBs for all or any portion of the cleanup costs.

The letter further states that EPA has recently discovered the presence of high quantities of PCBs in the river and harbor, that the state has chosen to single out our company, i.e., Belleville, and Cornell-Dubilier Electrical Corporation, and that there would appear to be some potential liability if a river cleanup program is mandated.

One of the newspaper articles enclosed with Tuttle's letter detailing the Commonwealth's then current plans for cleaning up the Acushnet River. Tuttle sent additional correspondence and news clippings concerning the PCB issue in New Bedford to Butler in June and July 1977.

On October 4, 1976, Belleville was formally notified that Monsanto would cease the sale and delivery of all PCB products used a dielectrics effective October 31, 1977.

On March 8, 1977, the public health commissioner of the Massachusetts Department of Public Health directed that bottom feeding fish, shellfish, and eels should not be taken for eating from the Acushnet River area of health reasons due to PCB contamination.

Effective July 1, 1977, Belleville's federal discharge permit specified that no more than 10 quarts per billion of PCBs could be discharged into the Acushnet River. In view of this new restriction Belleville instructed all of its foremen and department heads in May of 1977 that there can be absolutely no dumping of Aroclor or any oil or solvent into any of our sumps, hand basins, troughs, et cetera.

Belleville sold the facility to Aerovox Incorporated on September 28, 1978. In connection with that sale, all the liabilities resulting directly or indirectly from the use or disposal of PCBs by Belleville or its predecessors were expressly retained by Belleville.

On December 20, 1983, Belleville was sued by the United States and the Commonwealth of Massachusetts for violation of CERCLA and various state and federal laws.

On August 27, 1984, Lumbermens was notified that Belleville was named a s a defendant in this lawsuit and a defense by Lumbermems and indemnity was demanded and this demand was renewed on September 11, 1984.

The Court rules that this notice was reasonable notice of an occurrence under the applicable insurance policies. Indeed, it was impractical for Belleville to give any notice of any occurrence prior to the enactment of CERCLA. The simple fact is that while Belleville management knew for years that PCBs could well be the cause of adverse regulatory actions, Belleville neither expected nor intended any property damage or personal injury from its use of PCBs and had no knowledge that any such property damage or personal injury was occurring. True, it was aware of the potential of injury to the biota, that is, to plants and animals. Belleville executives, however, did not consider such injury to constitute property damage and, until the enactment of CERCLA they were on relatively firm ground in this view. Their view about the matter was confirmed, if anything, by the summary dismissal of lawsuits brought by lobsterers for injury to their lobstering grounds in 1981.

The policies in question do not require an insured to communicate speculations or threats of lawsuits, only actual claims or lawsuits need require notice to be given. The very language of the policy indicates clearly that notice is required if claim is made or suit is brought and this Belleville did within a reasonable time.

Belleville is also required to give notice in the event of an occurrence. However, given the difficulty that the courts themselves have had in defining what constitutes an occurrence, under these policies it would be unreasonable to hold Belleville to such clairvoyance that it ought have given notice any earlier than it in fact did in this case. Belleville simply did not expect until 1983 that it could be held liable for any property damage as a result of its discharge of PCBs. Of course it understood that regulatory activities could cause sanctions to be imposed against it, could result in litigation with government entities. and indeed could cause it to be shut down. But at no time prior to the commencement of the instant litigation could it reasonably have believed that it was causing property damage to an insurable interest. Its view was that birds and fish don't count. CERCLA changed that view. It would be an unreasonable interpretation of the policy language, however, to vitiate Belleville's coverage in these circumstances where at the time it thought no occurrence within the policy terms had occurred and where Lumbermens has striven mightily to the present day contending that no occurrence in fact ever took place.

Belleville has thus established that it gave reasonable notice of an occurrence under the insurance policies and that the property damage liability which it settled for the payment of $4 million in the underlying action brought by the sovereigns was neither expected nor intended from its standpoint. What is more, it has proved that at least a small fraction of the releases which took place during the year 1973, that is, the releases of PCBs which were washed from the walls and floor

of the facility and which suspended in the floodwaters, ran out around the east door of the facility into the Acushnet River and New Bedford Harbor, were both sudden and accidental. As to these releases, during 1973, then, Lumbermens is liable to indemnify Belleville.

With respect to the remaining policy years at issue, 1974 and 1975, Belleville has failed to prove that any releases during these periods were sudden and accidental. All such releases are, therefore, excluded from coverage under the pollution exclusion and Belleville cannot be indemnified for any such releases by Lumbermens.

With respect to the sudden and accidental releases in 1973, it falls to Lumbermens to prove what percentage of the property damage occasioned during the year 1973 and continuing into the period following the enactment of CERCLA is due to covered and uninsured risks. The Court can readily infer that by far the bulk of the releases in 1973 which subject Belleville to liability to the sovereigns were in no way sudden or accidental and thus do not subject Lumbermens to any liability. Indeed, it is only a portion of the releases occasioned by the storm in December of 1973 that are covered. Even so, there remains a very real issue whether Lumbermens can bear its burden of allocation or whether in light of the factual complexity of the issues the Court can do more than roughly approximate as between covered and uninsured risks entering judgment for Belleville for something less than fifty percent of the $4 million it has paid in settlement.

On the present record, however, such allocation is both possible and reasonable. It will be recalled that at the time of the December 1973 tropical storm Belleville's operations were devoted 99 percent to manufacturing involving Aroclor 1016, and Aroclor that is four-tenths of one percent biodegradable. The Court infers that the top layer of deposited PCBs on the floor and walls of the facility was, in December 1973, com-

prised almost entirely of Aroclor 1016. The Court further infers that it is this particular Aroclor that was washed out of the east door by the receding floodwaters during the course of the storm.

It will be remembered that in order for liability to attach to Belleville there must be a release from the facility which continues to cause damage during the period following the date of the enactment of CERCLA. *In re Acushnet River and New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F.Supp. 676, 684 D. Mass. (1989).

The Court thus concludes that all but four-tenths of one percent of the Aroclor 1016 suddenly and accidentally washed out of the facility during the tropical storm had biodegraded into other substances prior to the enactment of CERCLA. Four-tenths of one percent of $4 million is $16,000. In light of the biodegradability of Aroclor 1016 and the small percentage of sudden and accidental releases by Belleville, in comparison to the uninsured releases, this sum represents the most accurate allocation of damages.

Accordingly, judgment shall enter declaring that as to the 1973 insurance policy only Lumbermens is liable to indemnify Belleville for property damage occasioned by the sudden and accidental release of PCBs. Such indemnification is awarded in the sum of $16,000.

So ordered.

William G. Young
United States District Judge

Date: January 4, 1991

LUMBERMENS MUTUAL CASUALTY COMPANY *vs.* BELLEVILLE INDUSTRIES, INC.

Suffolk. March 7, 1990. - June 14, 1990.

Present: LIACOS, C.J., WILKINS, ABRAMS, LYNCH, & GREANEY, JJ.

Insurance, Comprehensive liability insurance, Pollution exclusion clause, Defense of proceedings against insured, Coverage, Construction of policy. *Contract*, Insurance, Construction of contract. *Supreme Judicial Court*, Certification of questions of law. *Words*, "Sudden," "Accidental."

In construing, as matter of Massachusetts law, an exception to the pollution exclusion clause contained in a policy of comprehensive general liability insurance, providing, "[T]his exclusion shall not apply if the discharge . . . [of pollutants] is sudden and accidental," this court held that the word "sudden," in conjunction with "accidental," was unambiguous and had a temporal element, that is, only an abrupt discharge or release of pollutants would fall within the exception and thus be covered by the policy. [677-682]

Where language in the pollution exclusion clause contained in a policy of comprehensive general liability insurance was unambiguous, this court had no occasion to consider either the drafting history of the clause or statements made by insurance company representatives concerning the intent of the drafters. [682-683]

In reply to a question of Massachusetts law certified to it by a Federal court, this court expressed the view that a declaratory judgment proceeding under G. L. c. 231A appears to be the only procedure clearly available in all circumstances for determining whether, in light of the allegations in a particular complaint, an insurer has a duty to defend an action against its insured. [683-686]

This court declined to answer a question of law certified to it by a Federal court where the record in the Federal case revealed substantial issues of fact and where the certification order did not contain the statement of facts required by S.J.C. Rule 1:03, § 3(2). [686-688]

CERTIFICATION of questions of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

Timothy C. Russell of the District of Columbia (*Michael S. Greco* with him) for the plaintiff.

David A. McLaughlin for the defendant.

William M. Savino, Stephen J. Smirti, Jr., Gary D. Centola, & Laurence Levy of New York, & *Cynthia J. Cohen* for Fireman's Fund Insurance Company joined in a brief.

The following submitted briefs for amici curiae:

Wm. Gerald McElroy, Jr., Janet L. R. Menna & Karl S. Vasiloff for Employers Insurance of Wausau.

James L. Ackerman for Aetna Casualty & Surety Co.

Howard T. Weir of the District of Columbia, *Brian T. Kenner, Martin C. Pentz, Maria Raia Hamilton, Richard W. Benka & Edward J. Stein* for AVX Corporation, & others.

Thomas W. Brunner, James M. Johnstone & Lyn S. Entzeroth of the District of Columbia, & *Peter G. Hermes & Molly H. Sherden* for Insurance Environmental Litigation Association & another.

WILKINS, J. A judge of the United States District Court for the District of Massachusetts has certified questions of law to us, pursuant to S.J.C. Rule 1:03, 382 Mass. 700 (1980), that arise out of a dispute between Lumbermens Mutual Casualty Company (Lumbermens) and its insured, Belleville Industries, Inc. (Belleville).[1] Belleville is one of the defendants in an action brought by the United States and the Commonwealth of Massachusetts in the United States District Court for the District of Massachusetts alleging that the defendants are liable for the polychlorinated biphenyl (PCB) pollution of New Bedford Harbor. In the mid-1970s, Belleville used PCBs in manufacturing electrical capacitators in a

[1]At the time the judge certified the questions to us, a similar dispute between Aerovox, Inc., and Fireman's Fund Insurance Company was also before him. That dispute, however, was settled before oral argument in this court.

plant it owned on the east bank of the Acushnet River, which flows into New Bedford Harbor. The background for the certification of the questions of law appears in *In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 725 F. Supp. 1264 (D. Mass. 1989), which we shall refer to hereafter as *Acushnet River*. The first set of questions concerns a dispute over the proper interpretation of an exception to the pollution exclusion clause in the comprehensive general liability policies that Lumbermens issued to Belleville. The second question deals with how an insurer might effectively terminate its duty to defend an action when the complaint alleges a claim that, on its face, falls within the coverage of the policy, but it appears from the known facts that the claim is entirely or almost entirely outside the policy coverage. The third question concerns which of the successive policies Lumbermens issued to Belleville provide coverage for damage caused by the occurrences. In addition, the judge has offered us an opportunity to comment on any other aspect of his discussion of Massachusetts law. *Acushnet River*, 725 F. Supp. at 1280-1281. We do not, however, see any additional matter on which we wish to comment.

1. In Belleville's comprehensive general liability insurance policy, Lumbermen's agreed, among other things and subject to certain exclusions and exceptions, to provide coverage for liability due to property damage caused by an occurrence. An "occurrence" is defined in the policy as "an accident . . . which results in . . . property damage neither expected nor intended from the standpoint of the insured." For the purposes of this case, the judge and the parties have assumed that the State and Federal governments, in their underlying claims, seek to recover for property damage caused by an occurrence.

Our focus has been directed to exclusion (f), the so-called pollution exclusion clause, which states that no insurance applies to property damage "arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or

other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental*" (emphasis supplied). In this case, Belleville argues that the exclusion does not apply to deny coverage because the releases of pollutants at issue in the underlying case were both "sudden and accidental" within the meaning of those words in the Lumbermens policy.

The certifying judge recognized that there is no unanimity of opinion, even within Massachusetts, concerning the proper interpretation of the "sudden and accidental" exception to the pollution exclusion clause. *Acushnet River*, 725 F. Supp. at 1279. He noted *Shapiro* v. *Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648 (1985), in which the Appeals Court had concluded that the clause was ambiguous and, therefore, provided coverage for the consequences of a gradual discharge of a pollutant. *Acushnet River*, 725 F. Supp. at 1267 n.7, 1279. He recognized, on the other hand, that another judge of the United States District Court for the District of Massachusetts had not followed the holding in the *Shapiro* case and had questioned whether this court would do so. *Id.* at 1279, citing *C.L. Hauthaway & Sons Corp.* v. *American Motorists Ins. Co.*, 712 F. Supp. 265, 268-269 (D. Mass. 1989). Indeed, the certifying judge himself rejected the *Shapiro* holding and concluded that the words "sudden and accidental" were not ambiguous. *Acushnet River*, 725 F. Supp. at 1267-1268 & nn.7-8.[3] But see *Allstate Ins. Co.* v. *Quinn Constr. Co.*, 713 F. Supp. 35, 41 (D. Mass. 1989), accepting, in dicta, the *Shapiro* opinion as authoritative.

[3]For other cases in which a Federal judge has declined to follow a State intermediate appellate court's conclusion that the language is ambiguous and has instead expressed the view that the State's highest court would not follow the intermediate appellate court, see *FL Aerospace* v. *Aetna Casualty & Sur. Co.*, 897 F.2d 214, 219-220 (6th Cir. 1990); *State* v. *Amro Realty Corp.*, 697 F. Supp. 99, 109-110 (N.D.N.Y. 1988); *Borden, Inc.* v. *Affiliated FM Ins. Co.*, 682 F. Supp. 927, 929 (S.D. Ohio 1987), aff'd without op., 865 F.2d 1267 (6th Cir.), cert. denied, 110 S.Ct. 68 (1989).

Although the certifying judge announced his construction of the exception in the pollution exclusion clause, he certified to us three questions concerning that issue: "(a) Is the word 'sudden' as appearing in the pollution exclusion clauses at issue in this case unambiguous? (b) If the answer to question (a) above is yes, does that term have a temporal quality? (c) If the answer to question (b) above is yes, what considerations ought this Court employ in determining which events qualify as 'sudden'?" *Acushnet River*, 725 F. Supp. at 1279.

The sudden event to which the exception in the pollution exclusion clause applies concerns neither the cause of the release of a pollutant nor the damage caused by the release. It is the release of pollutants itself that must have occurred suddenly, if the exception is to apply so as to provide coverage. The exception thus focuses on the circumstances of the release. In deciding whether there was an occurrence, on the other hand, the focus of the inquiry is on the property damage, asking whether it was expected or intended from the insured's point of view. Courts that have failed to appreciate this distinction have led themselves to identify an ambiguity in the policy language that does not exist. See *American Motorists Ins. Co.* v. *General Host Corp.*, 667 F. Supp. 1423, 1427-1429 (D. Kan. 1987), discussing the mistreatment of the pollution exclusion clause by certain courts. Other courts have construed "sudden" in isolation without recognizing the significance of the companion word "accidental." See *Claussen* v. *Aetna Casualty & Sur. Co.*, 259 Ga. 333, 335 (1989). See also Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1240 (1986), criticizing judicial treatment of the pollution exclusion clause.[3] We, of

[3]"Paradoxically, the courts have almost uniformly ignored the insurers' intent and distorted the phrase 'sudden and accidental' beyond recognition. With few exceptions, the courts have extended the coverage of policies containing the pollution exclusion 'to mean just what they choose it to mean.'" The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1240 (1986). The note correctly recognized three more recent opinions that denied coverage in particular circumstances as a possible "beginning of a trend of accurate judicial construction of the pollution exclusion." *Id.* at 1264-1268.

course, reject any temptation to let our own ideas of public policy concerning the desirability of insurance coverage for environmental damage guide our legal conclusions.

We dealt with the words "sudden and accidental" in an insurance policy in *New England Gas & Elec. Ass'n* v. *Ocean Accident & Guar. Corp.*, 330 Mass. 640 (1953). There, the question was whether the damage to property, a crack in the spindle of a turbine, was a sudden and accidental break. *Id.* at 650. The court did not need to define the word "sudden" with specificity because the cracking of the spindle was neither gradual (hence was rapid or quick) nor reasonably expected or foreseen. *Id.* at 654. In short, that opinion left unanswered the question whether "sudden," in conjunction with the word "accidental," means only unexpected and unforeseen (as Belleview argues) or whether it also has a temporal quality (as Lumbermens argues).

For the word "sudden" to have any significant purpose, and not to be surplusage when used generally in conjunction with the word "accidental," it must have a temporal aspect to its meaning, and not just the sense of something unexpected. We hold, therefore, that when used in describing a release of pollutants, "sudden" in conjunction with "accidental" has a temporal element. The issue is whether the release was sudden. The alternative is that it was gradual. If the release was abrupt and also accidental, there is coverage for an occurrence arising out of the discharge of pollutants.

We answer the first two portions of the first question as follows: (a) the word "sudden" in the context of the pollution exclusion clause is unambiguous and (b) it has a temporal quality. This is the conclusion of the better reasoned, and particularly the more recent, judicial interpretations of the pollution exclusion clause that appears in the standard comprehensive general liability policy.[4] There are many opinions

[4]See, e.g., *United States Fidelity & Guar. Co.* v. *Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir. 1988) ("We do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected."); *Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1326 (E.D. Mich. 1988)

reaching a contrary conclusion, the reasoning of which is criticized in many of the opinions just cited.[8] If the word "sudden" is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception.

The facts concerning the discharge of pollutants by Belleville have not been certified to us. Dealing with the certified questions in the abstract, we have said all that we can concerning the considerations that the judge should "employ in determining which events qualify as 'sudden.' " Surely, the abruptness of the commencement of the release or discharge of the pollutant is the crucial element.[9] Our certification rule calls for the presentation of the facts on which the certified question of law is based. See S.J.C. Rule 1:03, § 3 (2). We do not know enough about what the pollution was, and when

("Increasingly, the courts have rejected arguments similar to that being made here . . . that the phrase 'sudden and accidental' is ambiguous and are holding that 'sudden' includes a temporal aspect."); *State* v. *Amro Realty Corp.*, 697 F. Supp. 99, 110 (N.D.N.Y. 1988); *Borden, Inc.* v. *Affiliated FM Ins. Co.*, 682 F. Supp. 927, 930 (S.D. Ohio 1987); *American Motorists Ins. Co.* v. *General Host Corp.*, 667 F. Supp. 1423, 1428 (D. Kan. 1987); *International Minerals & Chemical Corp.* v. *Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 378 (1988); *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 141 A.D.2d 124, 131 (N.Y. 1988) ("A review of the most recent cases reveals that there is an emerging nationwide judicial consensus that the 'pollution exclusion' clause is unambiguous"), aff'd on other grounds, 74 N.Y.2d 66 (1989); *Waste Management of Carolinas, Inc.* v. *Peerless Ins. Co.*, 315 N.C. 688, 699-700 (1986); *Lower Paxon Township* v. *United States Fidelity & Guar. Co.*, 383 Pa. Super. 558, 576-578 (1989); *Just* v. *Land Reclamation, Ltd.*, 151 Wis. 2d 593, 601-602 (Ct. App. 1989).

[8]For examples of opinions that conclude that the pollution exclusion clause should be construed in favor of the insured to mean "unexpected and unintended," see *Claussen* v. *Aetna Casualty & Sur. Co.*, 259 Ga. 333, 338 (1989) (four to three decision); *Summit Assocs.* v. *Liberty Mut. Fire Ins. Co.*, 229 N.J. Super. 56, 63 (1988); *Kipin Indus., Inc.* v. *American Universal Ins. Co.*, 41 Ohio App. 3d 228, 231-232 (1987); *United Pac. Ins. Co.* v. *Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714 (1983).

[9]We decline to speculate on the proper construction of the exception, if a release or discharge, initially both accidental and sudden, continues for an extended period. As the discharge or release continues, at some point, presumably, it would likely cease to be accidental or sudden (even in the sense of unexpected).

and how the release or discharge started, to say anything further.

We acknowledge that, in answering the first set of questions certified to us, we are rejecting the contrary holding in *Shapiro* v. *Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 651-652 (1985). That opinion found guidance in our opinion in *New England Gas & Elec. Ass'n* v. *Ocean Accident & Guar. Corp.*, 330 Mass. 640 (1953), that we do not similarly find. The *Shapiro* opinion did not analyze the policy language but concluded that the policy was not free from ambiguity. We have analyzed the policy language and conclude that there is no construction of the word "sudden" that is a reasonable alternative to that which we have given it in the context of the pollution exclusion clause.

Because the word "sudden" in the pollution exclusion clause is not ambiguous, we have no need to consider the drafting history of that clause or any statements made by insurance company representatives concerning the intention of its drafters. There is no evidence in the record that Belleville relied on or was even aware of any of this background information when it purchased coverage from Lumbermens. The use of such information to resolve an ambiguity in Belleville's insurance policies would have nothing to do with contract negotiations, and thus its use would be different from the use of parol evidence to aid in resolving an ambiguity in a contract. Attempts to use the drafting history and official comments about the purpose of a provision in an insurance policy seem somewhat analogous to attempts to use legislative history in construing an ambiguous statute.

This court has not indicated the extent to which it is appropriate to use the drafting history of a provision in a standard form of insurance policy to resolve a dispute over the meaning of policy language. A formally published, explanatory report of an industry-wide committee that drafted particular policy language would appear likely to be a reliable source for resolving a policy ambiguity. Language changes from one standard policy form to the next would perhaps be instructive. See *Ratner* v. *Canadian Universal Ins. Co.*, 359

Mass. 375, 380 (1971). We have not considered, however, whether statements made after the adoption of standard language may properly be considered or whether the views of one insurance executive may properly be used to guide the interpretation of a standard form of policy used by many companies. Additionally, we have not decided whether the drafting history and other possibly instructive material must be included in the record on appeal and thus have been presented in a manner that would permit countervailing or explanatory material to be submitted in response. See *Eagle-Picher Indus., Inc.* v. *Liberty Mut. Ins. Co.*, 682 F.2d 12, 22 n.8 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983); *Lower Paxon Township* v. *United States Fidelity & Guar. Co.*, 383 Pa. Super. 558, 578 n.5 (1989). We mention this subject only because it appears that the issue will arise in subsequent litigation concerning the interpretation of standard form insurance policies.

2. The second certified question asks whether, under the common law of the Commonwealth, there is any procedure by which an insurer, with a duty to defend but with apparently only a negligible duty to indemnify, can terminate its duty to defend short of conclusively establishing the extent of the underlying claim in circumstances binding on the underlying claimant. The judge points to the opinion authored by Justice Kaplan in *Sterilite Corp.* v. *Continental Casualty Co.*, 17 Mass. App. Ct. 316, 323-324 (1983).[7] The full statement of the judge's reasons for asking the question appears

[7]Justice Kaplan wrote: "When, as in the present case, the allegations of the third-party complaint find apparent lodgment in the effective coverage of the policy, the insurer is obligated to defend. But it can, by certain steps, get clear of the duty from and after the time when it demonstrates with conclusive effect on the third party that as matter of fact — as distinguished from the appearances of the complaint and policy — the third party cannot establish a claim within the insurance. . . . What is not permitted is that an insurer shall escape its duty to defend the insured against a liability arising on the face of the complaint and policy, by dint of its own assertion that there is no coverage in fact: the insurer then stands in breach of its duty even if the third party fails in the end to support any such claim of liability by adequate proof." *Id.*

in the margin.[8] In concluding that the duty to indemnify was negligible, the judge assumed that the word "sudden" in the pollution exclusion clause had the temporal meaning that he had given it in discussing the first question certified to us.

Lumbermens makes no attempt to describe to us a common law procedure under which its duty to defend could be terminated conclusively without the entry of an order binding on the governmental claimants in this case. Lumbermens argues that, under Fed. R. Civ. P. 19, the underlying claimants are not necessary parties to a declaratory judgment action

[8]"2. *De Minimus Liability to Indemnify Pursuant to the Sterilite Decision*

"The decision of the Massachusetts Appeals Court in *Sterilite Corp. v. Continental Casualty Co.*, 17 Mass. App. Ct. 316, . . . clearly sets forth the procedure which an insurer with a duty to defend must follow to bring that duty to an end. This Court reads *Sterilite* as directly declaring the law of the Commonwealth and raises no question concerning it. Nevertheless, its application to the particular circumstances of this case warrants certification. This is so because, while this Court has ruled that the insurers in these related cases have an undoubted duty to defend, their ultimate duty to indemnify their insureds appears limited to only a small fraction of the damages which may ultimately be recoverable in this case. In aid of the record in addressing the question to be posed, this Court takes judicial notice, Fed.R.Evid. 201, that each of the insurers herein has incurred more than one million dollars in legal costs in providing a defense of its client in the underlying actions. Even so, were it not for the *Sterilite* requirement, there appears virtually no evidence that any significant contribution to the pollution at issue in the underlying case flowed from incidents which were 'sudden and accidental.' That is, if an insured is liable for PCB pollution of the Acushnet River and New Bedford Harbor as alleged by the sovereigns herein, it appears from the entire record assembled by this Court that the proportion of that pollution which may properly be characterized as 'sudden and accidental' is slight compared to the whole, and perhaps infinitesimal. Thus, it is only this small portion of the potential damages as to which the insurers have a duty to indemnify. Nevertheless, it appears clear under *Sterilite* that the insurers have a continuing duty to defend and this Court has so held. However, in the absence of a controlling decision from the Supreme Judicial Court, this Court deems it appropriate to inquire whether, pursuant to the common law of the Commonwealth, there is any procedure whereby an insurer with an undoubted duty to defend but with a negligible duty to indemnify can bring the continuing duty to defend to an end short of conclusively establishing as against the plaintiff in the underlying action the extent of the claim that is covered by the insurance." *Acushnet River*, 725 F. Supp. at 1279-1280.

brought against an insured to determine insurance coverage rights. Further, Lumbermens argues that, because the governmental claimants opposed efforts to place them in a procedural posture in which they could be conclusively bound, they should either be deemed not to be necessary parties or to have waived any requirement that they be conclusively bound by any declaration of rights. Finally, citing *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 5 (1987), and *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965), Lumbermens argues that principles governing the entry of summary judgment under Fed. R. Civ. P. 56 override the asserted additional prerequisite of the *Sterilite Corp.* opinion that the declaration must have a binding effect on underlying claimants.

Each of these arguments concerns an issue that Lumbermens could have raised, and indeed may have raised, with the Federal judge. None of them concerns a question of State law. Our rule authorizing certified questions from other courts relates solely to questions of Massachusetts law. We do not offer our gratuitous services to opine on questions of Federal law. In any event, the judge did not ask us about these issues of Federal law. He has asked us if there is a common law procedure for conclusively cutting short an insurer's duty to defend in which the underlying plaintiff would not be bound by the determination. In circumstances in which the party to be benefited by a particular answer does not argue the point to us, we feel no heavy burden to answer a certified question in detail. We abstain from speculating on why a declaratory judgment proceeding involving all concerned entities was not maintained in the Federal court.

A declaratory judgment in an action provides an appropriate means of deciding a dispute concerning the meaning of language in an insurance policy. See *Boston Symphony Orchestra, Inc.* v. *Commercial Union Ins. Co.*, 406 Mass. 7, 15-16 (1989). The problem becomes more complicated when the dispute between insurer and insured involves, not the construction of policy terms, but rather whether, in light of the allegations in a particular complaint, the insurer has a duty to defend. It is that issue that is discussed so thought-

fully in the *Sterilite Corp.* opinion. The need to have the underlying claimant bound by any judicial declaration concerning the insured's duty to defend does not exist because the underlying claimant would be a necessary party to the action (a matter on which we express no opinion). Rather, that need exists because, until there is an unalterable determination as to the nature of the underlying claim, any declaration of rights concerning the insurer's duty to defend cannot be conclusive. Although our answer (that a declaratory judgment proceeding under G. L. c. 231A [1988 ed.] provides a "procedure" for definitively resolving a "duty to defend" dispute) does not identify a common law procedure (as to which the judge inquired), it appears to be the only procedure clearly available in all circumstances.

We do not discount the possibility of an action solely between an insurer and an insured concerning the insurer's duty to defend, where the complaint in the underlying action is so general as to allege a claim arguably falling within the coverage of the policy, but it is apparent from the event that gave rise to the underlying claim that the loss is not covered by the insurance policy. See, e.g., *Atlantic Mut. Fire Ins. Co.* v. *Cook*, 619 F.2d 553, 554-555 (5th Cir. 1980). Although a determination that the insurer had no duty to defend in those circumstances would not foreclose such a duty if the facts of the underlying claim changed, or if the complaint were amended, that determination would relieve the insurer of a current duty to defend based on then-current circumstances. See *Terrio* v. *McDonough*, 16 Mass. App. Ct. 163, 168-169 (1983).

3. The third certified question asks which approach Massachusetts would follow in determining the point at which actual injury or damage to property takes place under the policy provisions in this case.[9] The certifying judge identified six

[9]The full statement of the judge's question appears below:

"3. *The 'Trigger' Issue*

"In the body of this opinion, this Court has held that the 'occurrence' provisions of the insurance policies here at issue require that the injury must take place during the policy period in order for coverage to be pro-

so-called "trigger theories" that have been adopted by various courts, and the parties collectively have urged this court to consider three of those theories.[10]

We agree with the certifying judge the "[a] crucial factor in determining when an injury occurs for purposes of insurance coverage is the nature of the injury." *Acushnet River*, 725 F. Supp. at 1276. On the record before us, there are substantial issues of fact as to the nature and scope of the property damage the sovereigns will seek to prove. See *id.* at 1272, 1276-1277. Indeed, the certifying judge himself concluded that the factual record was insufficiently developed to permit him to reach the question of which trigger theory is appropriate. *Id.* Our rule requires that certification orders contain "a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." S.J.C. Rule 1:03, § 3 (2). We

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vided. In addressing when the injury took place in this case, the Court has identified six different approaches, each supported by case citation. These are: the wrongful act theory, the release theory, the injury-in-fact theory, the manifestation theory, the first discovery theory, and the continuous trigger theory. While the most analogous Supreme Judicial Court decision, *Continental Casualty Co.* v. *Gilbane Bldg. Co.*, 391 Mass. 143, 146, 461 N.E.2d 209 (1984), rejects the wrongful act theory, it does not provide definitive guidance concerning the manner of determining when the actual injury takes place and thus which policy of insurance provides the coverage. Accordingly, this Court certifies the following query—under the provisions which trigger insurance coverage in the policies at issue in these related cases, what approach is followed under Massachusetts law in determining at what point, or over what period, insurance coverage is to attach?" *Acushnet River*, 725 F. Supp. at 1280.

[10]Under the policies, " 'property damage' means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."

Lumbermens urges us to adopt either the manifestation theory or the first-discovery theory. Belleville argues that the injury-in-fact theory is correct. This court already has rejected the wrongful act theory as contrary to the language of the policy. See *Continental Casualty Co.* v. *Gilbane Bldg. Co.*, 391 Mass. 143, 152 (1984).

have no such statement. Accordingly, we too decline to answer the third question.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 91-1129

LUMBERMENS MUTUAL CASUALTY CO.,
Plaintiff, Appellee,

v.

BELLEVILLE INDUSTRIES, INC.,
Defendant, Appellant.

No. 91-1130

LUMBERMENS MUTUAL CASUALTY CO.,
Plaintiff, Appellant,

v.

BELLEVILLE INDUSTRIES, INC.,
Defendant, Appellee.

Before

CAMPBELL, *Circuit Judge*,
COFFIN AND BOWNES, *Senior Circuit Judges*,
TURRUELLA, SELYA AND CYR, *Circuit Judges**.

ORDER OF COURT

Entered: August 28, 1991

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

The motion of Polaroid Corporation for leave to file a brief *amicus curiae* is denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

By: _____
Daniel F. Loughry
Chief Deputy Clerk

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*Chief Judge Breyer did not participate

[cc: Messrs. Culbert, Brunner, McLaughlin and Crotty]

APPENDIX D

Statutes.

28 U.S.C. § 1652

State Laws as Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

42 U.S.C. § 9607

Liability

(j) **Obligations or liability pursuant to federally permitted release.** Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 101(10)(B) or (C) [42 USCS sec. 9601(10)(B) or (C)] shall be recoverable in an action brought under section 309(b) of the Clean Water Act [33 USCS sec. 1319(b)].

42 U.S.C. § 9601

Definitions

* * *

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342], (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342] and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of the Federal Water Pollution Control Act [33 USCS § 1342], which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 404 of the Federal Water Pollution Control Act [42 USCS § 1344] (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 USCS § 6925(a)-(d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 102 of [or] section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 [33 USCS § 1412 or 1413], (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of

the Safe Drinking Water Act [42 USCS §§ 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 USCS §§ 7411, 7412, 7470 et seq., 7501 et seq., or 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 307(b) or (c) of the Clean Water Act [33 USCS § 1317(b) or (c)] and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 402 of such Act [33 USCS § 1342], and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 USCS §§ 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954 [42 USCS §§ 2011 et seq.].

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 52.

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).